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THE EARLY HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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INTRODUCTORY STATEMENT

On February 17, 1920, the Association of the Bar of the City of New York celebrated the fiftieth anniversary of its organization, and on that occasion the story of the organization and development of the association during the past fifty years was told by Edward W. Sheldon, Esq., of the New York Bar.

The birth of this Bar Association in New York City and its results are, not only, among the most important events in the history of the profession in America, but also among the most significant chapters in the history of civil government in America. The association came into existence as the result of the final stand taken by those members of the New York bar who believed in reasonably decent standards of judicial and professional conduct, and who were ready to "go through" and defend those standards before the public against the almost utter demoralization of the bench and bar, which developed after the system of an elective judiciary had been substituted in 1846 for an appointive system.

The elective system of selecting judges was not, of course, the sole cause of the situation which existed in New York in 1870, but that system, combined with the demoralizing conditions which followed the Civil War, resulted in a combination of political forces in New York City, in the State Capitol, and on the New York bench under the control of the "Tweed Ring."

This combination was probably the most powerful political monster which has yet appeared in American government, and it is to the lasting credit of the founders of the Bar Association of the City of New York that, not only did they take the lead in the defense of standards of character and conduct in the profession, but they also "carried on" until, by impeachments and forced resignations, they drove from the bench the worst men who had disgraced it.

It is only necessary to mention the fact that a murderous, and almost fatal, assault was made on Mr. Dorman B. Eaton on February 15, 1870, as one of the incidents in the story, to suggest the sort of opposition which members of the bar like Mr. Eaton and his associates faced when they began to try to clean the bench of New York.

Anyone who is interested in some of the details of the conditions will find them vividly described in three articles in the *North American Review;* one entitled "The Judiciary of New York City," in the number of the *Review* for July, 1867, page 148; one by Mr. Charles F. Adams, in the *Review* for April, 1871, page 241, entitled "An Erie Raid"; and another by Mr. Albert Stickney, in the same number, entitled "The Lawyer and his Clients," page 392.

In these days when bar associations are apt to be sneered

at and laughed at and referred to as "lawyers' trusts, highbrows, etc.," the members of the Massachusetts bar will be interested to see this story of what one bar association did for the profession in general and for the people of New York. After reading the story, they will understand better what the names of Samuel J. Tilden, Dorman B. Eaton, William M. Evarts, Wheeler H. Peckham, Joshua M. Van Cott, John E. Parsons, Albert Stickney, Joseph H. Choate, James C. Carter, and others mentioned by Mr. Sheldon mean in the history of the American Bar.

It is important that this story should be known and remembered, not only in New York, but elsewhere.

F. W. G.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

HISTORICAL SKETCH

1870–1920

Previous associations of the bar

The association of lawyers for fellowship, mutual benefit and the maintenance of the dignity of the profession is almost coeval with our legal system. The Inns of Court in England have for centuries occupied a unique position, and besides admitting students, providing for their instruction through the Council of Legal Education, and calling them to the bar, are the guardians of professional standards of conduct. As an associated body the French bar may have had as early an origin, while the federation of the legal profession in Italy is said to date back to the Roman period. But in this country definite organization of the bar arose slowly. Twice in the eighteenth century the lawyers of New York City are reported to have combined in the public interest, once in 1744, to make the tenure of the judiciary dependent solely on good behavior and not on the pleasure of the King, and again in 1763, when the attempt of Lieutenant

Governor Colden to permit the review by the Governor and Council, both as to the law and the facts, of all cases decided by the courts, was resisted by the bar with a force and unanimity which proved irresistible. But there was no formal union of the profession for either of those purposes. They were but incidents in the widespread and growing revolt of the Colony at large against Royal authority, and the New York lawyers pursued their unorganized way for a century longer. The first corporate combination in the country seems to have been effected in 1802, when, modeled perhaps on the Library Company of Philadelphia, of which Franklin was an incorporator in 1742, The Law Library Company of the City of Philadelphia was chartered. Its sole original purpose was the establishment of an adequate collection of books for the use of its members. In 1827, however, it was merged with The Associated Members of the Bar of Philadelphia, an unincorporated body dating from 1821, and became The Law Association of Philadelphia. The consolidated body is empowered to maintain general supervision over the conduct of lawyers and the administration of justice, but in actual experience this distinguished company has pursued its dignified and honorable career with but rare occasion to exercise either its disciplinary function on members of the bar or its corrective influence over legislation or judicial selections. The corporate emphasis has thus rather been laid on the admirable library of the society and the genial intercourse between members that there proclaims so attractively the brotherhood of the bench and bar.

The Association of the Bar of the City of New York

had no such peaceful origin. It was formed to remove abuses in the administration of justice which threatened the foundations of society, and which not only involved our city and State but had as well supreme national significance. The story is not a pleasant one to recall, but is essential to an understanding of what the Association represents.

Debased conditions in New York City. 1869-70

Toward the end of the year 1869, political and judicial conditions in this city had become intolerably shameful. The country at large was gathering itself together after its fateful internecine struggle. War, the great solvent, as Emerson said, had severed the old adhesions, and the atoms of the social order were assuming a new adjustment. The opening of a continent was under way, and a period of great industrial development was fairly begun. The national energies were unloosed again in peaceful competition, and were moved by an irresistible appeal to the American spirit of freedom and growth. But here in New York, by one of the accidents of democratic government, circumstances had for several years been combining to create a foul blot in municipal conditions. An audacious oligarchy, known the world over as the Tweed Ring, for the most part vulgar and without exception unscrupulous, controlled the municipal government and the State Legislature, and was believed to exert a powerful influence over the Governor. Through its control also of the local judiciary the Ring gained added patronage and was free from attack in the courts. Corruption thus ran riot, and the city was at the lowest moral ebb it has ever reached. Our form of government had not lacked previous experi-

ence of political corruption. In the administration of law, however, our traditions were so sound and so ancient that the nation had arisen, developed and gone through successive wars and internal disturbances, without losing its firm hold on those elementary principles of private right and public justice which are our Anglo-Saxon heritage. Trained as we have been to that standard, it requires a mental effort fifty years later to picture how black a cloud then enveloped the judicial system in this city. Justice had come to be openly bought, sold and denied. Without yielding to iniquitous conditions no lawyer could practice in the courts effectively, and no client's cause was safe. As a sequence, if not as a result, of the radical changes introduced in the Constitution of 1846, the profession was crowded with disreputable and ignorant practitioners, and a few unworthy judges debased their high office. It was not possible to know how far the poison of corruption had permeated either bar or bench. But in general estimation both bar and bench had sunk incredibly low, and it was becoming a reproach to belong to either. The maladministration of justice had brought the city into deep reproach throughout the country and had sullied its fair name abroad. Dishonor thus fell upon all American jurisprudence. The situation was full of menace, and it became manifest that unless an attempt at deliverance was undertaken by the lawyers themselves, they as well as the community would suffer irretrievably. Yet while the profession contained many members of high character and courage, they were unorganized, and unless effectively united were helpless. To the founders of this Association must be given the immense credit of correctly

appraising the public danger and of courageously applying the first remedy. In December, 1869, an agreement to form an association and to call a meeting of the subscribers to effect such organization was prepared and subsequently signed by two hundred and thirty-one representatives of the best traditions of the bar. On the evening of February 1, 1870, in what was then known as the Studio Building, at the southwest corner of Fifth Avenue and Twenty-sixth Street, that momentous meeting was held. It was largely attended, and though conducted with dignity and marked repression in speech, was evidently dominated by deep emotion and earnest determination. The first speaker referred in nicely chosen language to the growing number of lawyers in the city, to the importance of their organization for social intercourse and for the freer exchange of ideas, to the value of a well-equipped law library for their use, and to the duty of organization which the profession owed to itself. The real cause for the meeting, the depravity of the bench, was not at first mentioned. Indeed, one of the early speakers expressly said: "We are here simply concerned with ourselves, and not with the Judiciary." And it was not until the meeting was nearly over that Mr. Samuel J. Tilden, who had been urged to say something, deprecated the too peaceable tone of previous remarks, and brought forth great applause when he said: "The Bar, if it is to continue to exist—if it would restore itself to the dignity and honor which it once possessed—must be bold in defence, and if need be, bold in aggression. If it will do its duty to itself, if it will do its duty to the profession

Call for an organization of the bar

Meeting of February 1, 1870

which it follows, and to which it is devoted, the Bar can do everything else. It can have reformed constitutions, it can have a reformed judiciary, it can have the administration of justice made pure and honorable. . . . It is impossible for New York to remain the center of commerce and capital for this continent unless it has an independent bar and an honest Judiciary." In his sketch of Mr. Tilden which adorns the Association's Memorial Book for 1887, Mr. William Allen Butler graphically describes that scene, and adds that the organization of this Association may almost be said to have inaugurated Mr. Tilden's public career.

Having appointed a committee to draft a constitution and by-laws, and another committee to nominate officers, the meeting adjourned until February 15, 1870. On that day a constitution was adopted for "The Bar Association of the City of New York," which declared in memorable words that

Formation of the Bar Association

> "The Association is established to maintain the honor and dignity of the profession of the law, to cultivate social intercourse among its members, and to increase its usefulness in promoting the due administration of justice."

A few by-laws were also adopted, various officers, including Mr. William M. Evarts as President, an Executive Committee and a Committee on Admissions were elected. The Executive Committee, which consisted of the Messrs. Francis C. Barlow, William C. Barrett, James C. Carter, William G. Choate, William E. Curtis, James Emott, Samuel B. Garvin, Stephen P. Nash, Henry Nicoll, John E. Parsons, Charles A. Rapallo, Hamilton W. Robin-

son, Augustus F. Smith, Henry A. Tailer and Sidney Webster, was instructed to prepare a suitable address to the lawyers of the city and State of New York, describing the formation and objects of the Association and suggesting that similar associations be formed throughout the State. This suggestion, as we shall see later, bore fruit in the organization of the New York State Bar Association and of several municipal associations.

A tragic touch was given to the meeting of February 15th by the murderous and almost fatal assault three nights before on Mr. Dorman B. Eaton, who had spoken at the meeting of February 1st and had been previously a resolute critic of the prevailing political and judicial degradation. It was with deep feeling, therefore, that before the meeting of February 15th adjourned, the following preamble and resolution were offered, and it was announced that the sum of money therein named had been provided. They were adopted as offered:

> "WHEREAS, on Saturday, February 12th, an attempt was made on the life of Dorman B. Eaton, under circumstances which lead to the belief that the attempt was instigated by private malice:
>
> "*Resolved*, That the Executive Committee of this Association be instructed to offer through the proper authorities a reward of $5,000 for the apprehension and conviction of the person or persons engaged in such attempt, to be paid on conviction."

Unfortunately Mr. Eaton's assailants escaped detection and the crime remained unpunished.

The first regular quarterly meeting of the Association was held on March 8, 1870, and two hundred and twenty-

eight additional members were elected. The nucleus of a library was provided. A draft act of incorporation, prepared by Mr. Charles A. Rapallo, was submitted and approved. The present corporate title was given in the bill, "The Association of the Bar of the City of New York," and its purposes were declared to be those specified in the original constitution. The following month a club house was acquired. Meanwhile the Association had been fairly launched on its eventful career. While no plan of action was announced nor any prediction of the scope of that career made, the reform of the judiciary was, of course, the great object which the leaders of the Association had in mind. As a first step it was voted in May, 1870, to send a special committee to the Governor of the State to urge that he designate for the General Term of the Supreme Court in the First Department, for the five years' term which had just been established, three justices from other districts in the State. This was for a double purpose, to facilitate the determination of appellate cases, which, with only five justices in the First District, were sadly in arrears, and to prevent suspected justices in that District from sitting in the higher court. William M. Tweed, our ruler at the time, having heard before the vote was taken of this intention of the Association, is reported to have telegraphed the Governor asking that three justices of this District, named by Tweed, be designated for the General Term, and the Governor complied before the Association's committee could be heard. The Governor sought subsequently to excuse his action by alleging the inconvenience of transferring justices from other districts to New York City.

Judicial reform undertaken

The magnitude of the undertaking on which the Association had embarked was obvious. Corruption was so deep-seated, was supported by such political power in both city and state governments, that extensive preparations were necessary. Public sentiment had to be aroused, and a campaign of education was started. The Association itself needed strengthening and the authority and permanence which incorporation would give. The draft charter approved at the meeting of March 8, 1870, was later presented to the Legislature, but failed of enactment. A materially different charter was then passed by both Houses. As this was quite unsatisfactory in form to the proposed incorporators, the Governor, in the face of their protest, did not feel able to sign the bill. This unexpected check at Albany delayed the Association's plans, and was a striking illustration of the insolent and perverted spirit that actuated our Ring-ridden Legislature. Another attempt at incorporation was made at the next session, and on April 28, 1871, the charter for which the Association asked became law. Meanwhile the clear purpose of the Association to remedy existing judicial abuses had a marked effect in crystallizing public sentiment. The *New York Times* began in July, 1871, the publication of startling evidence of the gross pillaging of the City treasury in which the Ring had been engaged. In September, at a notable meeting in the Cooper Union, a citizens' Executive Committee of Seventy was appointed. This included several members of the Association. The meeting, indeed, was largely guided by representatives of the Association. Mr. Joseph H. Choate, who with Mr. Tilden and others had issued the call for

the meeting, presented the stirring resolutions which gave Thomas Nast the text for one of his trenchant cartoons. In October a special committee was appointed by the Association to secure the nomination of suitable candidates for the bench. In behalf of these candidates and of the reform candidates for the Legislature a vigorous but anxious campaign was waged by the Committee of Seventy and the Association. To provide against disorder, apprehension of which was justified both by existing lawless conditions and by the Orange riot of the preceding July, the militia regiments were assembled in their armories on election day. When the vote was announced it was found that the cause of reform had won an overwhelming triumph. Only one of the Ring candidates, Tweed himself, escaped defeat at the polls, and even he did not assume the seat in the State Senate to which he had been elected. After such a victory and with an honest Legislature assured, it was felt that the time had come for aggressive action to purge the bench of any unfit judges. So at a called meeting of the Association, held on November 14th, a special committee was appointed to prepare such amendments of the Code and other laws relating to judicial administration as seemed requisite to correct the abuses that had crept into every department of the government, and the Judiciary Committee was instructed to inquire into the truth of the charges which had gained credit in the community reflecting upon the integrity of the administration of justice, to collect any existing evidence and to report what action the Association should take. The meeting also thought it proper to re-affirm and spread on the minutes as a safe guide of judicial action Sir

Matthew Hale's famous rules. The following incisive resolutions were then adopted:

> "*Resolved*, That we may rightfully require from every judicial officer the faithful observance of these salutary rules of action." (As laid down by Sir Matthew Hale.)
>
> "*Resolved*, That the great interests of our profession, no less than the public safety, imperatively demand that whoever shall debase the sacred office of judge, by corrupt administration or by personal or partisan abuse of its powers, shall with due and regular procedure be promptly brought to trial and punishment.
>
> "*Resolved*, That attorneys and advocates are not at liberty to invite or share in any violation of judicial propriety; and whenever they promote or purposely avail themselves of judicial corruption or favoritism, they are accomplices in the betrayal of justice, and unworthy to be members of this Society."

It would have fittingly balanced the great English jurist's solemn declaration, and eloquently expressed the feelings of the Association, if the record might also have contained Chief Justice Marshall's burning words as a delegate to the Virginia Constitutional Convention in 1830: "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted on an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

The Judiciary Committee, to which this delicate and crucial task was entrusted, had for its members the Messrs. Wheeler H. Peckham, Noah Davis, John Slosson, Gilbert M. Speir, Joshua M. Van Cott, William M. Pritchard, James C. Carter, Francis C. Barlow, William Allen Butler and Charles P. Crosby. At the January, 1872, meeting

the committee reported its unanimous conclusion that the charges which had been referred to the committee for examination, had a just foundation in trustworthy evidence; that they called for investigation by the Legislature, and that the judges against whom the charges were proved should be removed from office. These charges were summarized in substance as follows:

Charges against certain judges

> The gross abuse of judicial powers in granting injunctions, in creating receiverships, in appointing referees, in making excessive allowances to receivers, referees and counsel, in holding court in improper places, in making improper *ex parte* orders, in deciding motions and causes without a hearing, in debasing the writ of *habeas corpus* by granting it in unlawful, and withholding it in lawful, cases, in attempting to intimidate counsel in the discharge of their duty to clients, in preferences and pecuniary advancement to favored counsel, in gross and indecorous conduct in court, in various acts indicating corrupt influence on their official conduct and decisions, and in a general perversion of judicial powers, to evade justice and to accomplish unlawful ends.

The report of the Judiciary Committee was adopted by the Association, and the memorial to the Legislature which the committee submitted was entrusted to a special committee for presentation. In dignity and force this memorial was a model. It read as follows:

Memorial to Legislature

> "To the Honorable the Legislature of the State of New York:
>
> "The Memorial of the Association of the Bar of the City of New York respectfully represents to your

honorable body that the said Association was organized in February, 1870, and was afterwards incorporated by a special act passed April 28, 1871, and that its principal objects are to maintain the honor and dignity of the profession of the law, and to increase its usefulness in promoting the due administration of justice, and that the said Association has, at the present time, more than five hundred members regularly engaged in the practice of the law in the City of New York.

"Your memorialists further represent that for several years last past, the administration of justice in said City, both civil and criminal, has failed to command that measure of public confidence which is essential in order that it may accomplish its beneficent ends; that the integrity of several high judicial officers, occupying places upon the Bench in said City, has fallen under distrust; that the profession and the public have become and are becoming more and more alarmed at the course and tendency of judicial action, and the general suspicions have ripened into convictions that the Courts of justice have been in many instances made the instruments of promoting the frauds and injustice they were created to repress and punish.

"Your memorialists further represent that—charges directly impeaching the judicial integrity of some of the Judges upon the Bench in said City have been repeatedly made in the most explicit manner in many of the principal journals of the day, and thus circulated throughout the United States, and in foreign countries, and that in these and other ways the administration of justice in said City and the honor and fair fame not only of that City, but also of the State, have become widely involved in doubt and suspicion and that by reason of the condition of things herein set forth capitalists have been alarmed, and important commercial and financial enterprises have been diverted from said City,

and that its general prosperity is likely to be still further materially retarded.

"Your memorialists further represent that the public alarm and apprehension thus aroused for the security of the rights of person and property and the general indignation at the reproach thus drawn upon the City of New York and the State were among the exciting causes which led to the popular uprising at the recent election in that City, and that the fruits of that election would be in a great measure lost unless the distrust herein mentioned should be shown to be without foundation or be removed by the application of the most efficient remedies; and that it is due to the administration of justice and to the many learned and upright members of the bench, and to those whose character and usefulness have been and are affected and impaired, that a rigid inquiry should be instituted by the Legislature, and such remedies applied as the results of that inquiry may demand.

"Your memorialists further represent that at one of the regular meetings of said Association, held in the City of New York on the 14th of November, 1871, a resolution was adopted, of which a copy is annexed to this memorial, and that in pursuance of such resolution the Committee therein mentioned afterward made to the said Association a report, of which a copy is also hereto annexed; and that the said report was afterward adopted at a regular meeting of the said Association held on the 4th day of January, 1872, and that at the meeting last mentioned a further resolution was adopted of which a copy is annexed hereto.

"Your memorialists, therefore, pray that your honorable bodies, or one of them, make such inquiries and investigations and take such other proceedings in the premises as to their wisdom may seem fit.

"And as in duty bound will ever pray."

Proceedings before the Legislature

The State Assembly having referred this memorial to the Judiciary Committee for investigation, and the Association having appointed the Messrs. Joshua M. Van Cott, John E. Parsons and Albert Stickney as its representatives before the Assembly Committee, the inquiry was prosecuted diligently. Charges were formulated against two justices of the Supreme Court for New York County and one judge of the Superior Court of the City of New York. Separate hearings were had in the case of each judge. Between February 19th and April 11th a large amount of testimony was taken. The Assembly Committee reported this testimony on April 30th, and recommended the adoption of resolutions for the impeachment or removal of the three judges. Early in May, while this testimony was still under consideration by the Assembly, one of the Supreme Court justices resigned. In the case of the Superior Court judge the Assembly, in accordance with the prevailing constitutional procedure, voted on May 14th to transmit the charges and supporting testimony to the Governor, who in turn, without passing upon the charges, laid them before the Senate with the recommendation that they be inquired into and if established that the accused judge be removed. Thereupon the Senate convened in extra session, and after overruling the objection raised in behalf of the judge that the Governor's procedure was irregular, and hearing the testimony and the arguments of the same counsel for the Association and of counsel for the accused official, found him guilty as to seven out of the eight charges, and on July 2d removed him from office. He did not long survive this disgrace

and died on July 5, 1872. In the meantime, on May 12th the Assembly had voted to impeach the other Supreme Court justice, and exhibited to the Senate thirty-eight articles of impeachment, charging him with venal and corrupt administration of his office. The details of these charges need not be enumerated. They fully bore out the wrongdoing reported to the Association by its Judiciary Committee in the preceding January and summarized above. Among the specifications was the gross abuse of judicial process in three corporate scandals of vast importance which have become historic, the lawless manipulation of the finances of the Erie Railway Company, the piratical and violent attempt of the officials of that Company to seize the Albany and Susquehanna Railroad, and the baseless receivership of property of the Union Pacific Railroad Company. Mr. Charles Francis Adams drew vivid pictures of these criminal ventures in two magazine articles entitled respectively "A Chapter of Erie," and "An Erie Raid," which, with an equally striking article by his brother Henry, "The Gold Conspiracy," were subsequently published as part of the volume called "Chapters of Erie and Other Essays." Impeachment Managers having been appointed by the Assembly, the Messrs. Van Cott, Parsons and Stickney were selected as their counsel and bore the burden of the long trial. The Court of Impeachment, consisting of the seven judges of the Court of Appeals and the thirty-one members of the Senate, assembled on May 13th and organized on May 22d. Rules of procedure were adopted, the respondent was arraigned and adjournment taken until July 17th at Saratoga Springs. From that date daily sessions were

had until August 19th, when the respondent was found guilty upon twenty-five of the thirty-eight charges, was unanimously removed from office, and by a vote of thirty-three members of the Court to two, was forever disqualified to hold any office of honor, trust or profit under this State.

Success of efforts

It would be hard to point to a more valuable public service than that rendered by the Association in this reform of New York's judicial scandals. Almost singlehanded it organized, conducted and won a fight against firmly seated corruption. The victory was gained by tireless effort, guided by a noble standard of public and private virtue, and exerted with consummate ability. Countless obstacles were overcome, nearly $40,000, contributed principally by members of the Association, was spent, and the Association never relaxed its vigilance until complete success had crowned its long struggle. In receiving the report of their stewardship from the Messrs. Van Cott, Parsons and Stickney, the Association expressed to them its enduring gratitude for "the faithful, fearless and able performance of the duty devolved upon them" in conducting "to a successful issue the most important trial that had ever taken place in the history of our jurisprudence." The press of the City was no less generous in its praise. The *Evening Post* said: "It is difficult to estimate, and almost impossible to over-estimate, the importance of this trial and its signal result." The *Times*' comment was: "With Barnard's conviction the work of judicial reform has, to a certain extent, become a rounded whole. The Bar Association has accomplished what it undertook to do, and

can address itself to the fresh tasks which invite its hand, with a new lease of public confidence, and with all the prestige of success." The *Tribune* was even more emphatic: "Our gratitude, therefore, to the members of the Bar Association who have borne the heavy labor of this prosecution and faced the danger of a possible failure, the personal consequences of which to them must have been disastrous, can hardly be overstated. They have rid the profession of its greatest scandal and society of one of its worst sources of demoralization. They have taught a cynical and unbelieving world, too, that even in Ring-ridden New York there is a punishment for corruption, and there are crimes which all the powers of fraud, money and political influence are powerless to protect." While the *Nation* said: "The greatest triumph the cause of reform has yet won was achieved at Albany on Monday last in the conviction of Barnard. . . . The triumph of justice and decency will not be complete, however, unless those who have borne the brunt of the battle are now remembered and honored. We would advise those, too, who doubted whether the Bar Association would be able to do anything for reform inside of ten years, to look at what it has done in the present contest. It took charge of the proceedings against the judges immediately after the election last fall, and in spite of every kind of obstacle, either drove them from the bench or got them impeached. It is safe to say that it is now a power which no judge will forget or set at defiance, and that it will supply that restraining public opinion from which the courts have for a good many years been almost completely exempt."

The praise that came to those three counsel posthumously confirmed the accuracy of the contemporaneous estimate of their work. When Mr. Van Cott died in 1896 his share was described by Mr. Parsons in the Association's memorial as follows: "It was of incalculable service in aiding to establish the high standard upon which he insisted for the discharge of judicial functions and in elevating the standard which he maintained for the relations between lawyers and their clients, the courts and the community. It was only with feelings of the intensest scorn that he could regard anything which was low or debasing. Mr. Van Cott was a knight-errant in his contest." On Mr. Parsons' own death in 1915, Mr. Joseph H. Choate, who had himself played a matchless part in the great reform, testified to the masterly way in which the Association, at that "shocking point in our history, vindicated its title as the conservator of the Commonwealth," and to the unremitting toil and distinguished ability which Mr. Parsons devoted to the excision of the "terrible cancer" which was "preying upon the vitals" of the courts of justice. And in 1908, on the death of Mr. Stickney, who was the same intrepid and fiery soldier in that contest that he had been in the long years of our Civil War, the Executive Committee thought it fitting, in addition to the regular memorial that was forthcoming, to report to the Association this special minute of him: "Active in the founding of the Association; self-sacrificing and indomitable in its great natal struggle against judicial corruption; resourceful in later councils of importance; fearless and tireless always for the right, he was a gallant and happy warrior in every contest in behalf of those professional and judicial

ideals upon which the inspiration and best achievement of the Association depend."

With such a victory to the credit of the Association, it was not strange that the attention of the lawyers of the country should be drawn to the value of organization. In its initial address to the bar in 1870 the Executive Committee had suggested in the public interest the foundation of similar associations in other cities and counties of the State, as well as the establishment of a State bar association. In direct response to this, the New York State Bar Association was chartered in 1877, the Association of the Bar of Oneida County in 1872, the Buffalo Bar Association in 1876, and the Columbia County Bar Association in 1878. Other counties and cities in the State took similar action. In December, 1872, the lawyers of Chicago followed New York's example by forming the Chicago Bar Association. The Boston bar, likewise stimulated, as may be inferred, by the experiences of their New York brethren, formed the Bar Association of the City of Boston in 1876. This was incorporated in 1886 with powers corresponding to those conferred by our own charter, and has since pursued an active career. Many other associations in different parts of the country came into being under the spur of the great reform achieved here, and that event may fairly be regarded as the moving cause of the systematic organization of the national bar.

Other bar associations formed throughout the country

Its most pressing duty having been fulfilled, the Association settled down to the regular performance of its

corporate duties. These naturally resolved themselves into several main heads, the preservation of the purity of the bench, the correction of professional misbehavior, the supervision of changes in the statutory law, the reform and enforcement of law in general, the cultivation of its study, and the encouragement of fraternal relations with the bar at large and of social intercourse among its members. These subjects will be treated in that order.

Guarding against future judicial corruption

After such an orgy of judicial corruption had been subdued, it followed logically that among "the fresh tasks to which the Association would address itself, the first, and as it has proved, the never-ending duty, should be lessening the chance of a recurrence of that calamity. Within the memory of many of its members, the State had lived under an appointive judiciary. Several of those members had taken part in the Convention which drafted the Constitution of 1846, and had contested the proposed adoption of the elective system. They shared the opinion afterwards expressed by the author of "The American Commonwealth" that it was "a perfectly wanton change," suggested by no necessity and promising no real gain. As Lord Bryce further described it, "There had been an excellent Bench, adorned, as it happened, by one of the greatest judges of modern times, the illustrious Chancellor Kent. . . . But the quest of a more perfect freedom and equality on which the Convention started the people, gave them in twenty-five years Judge Barnard instead of Chancellor Kent." If the State had possessed an organized bar in 1846, this "wanton change" in the judicial system might have been averted.

So widely diffused was the doubt, after twenty years of trial, of the desirability of an elective judiciary, that the Constitutional Convention of 1867–68 had advised that the people should decide by ballot whether the judges of the higher courts should thereafter be appointed or elected. The Association exerted all its influence to have this recommendation carried out. By chapter 314 of the laws of 1873, such a referendum was ordered. In October the Association earnestly recommended to the people of the State the adoption of the proposed constitutional amendment to be submitted at the ensuing November election, and instructed the Executive Committee to provide ballots suitable for the use of voters and to take all other proper measures to secure the adoption of the amendment. An impressive address was thereupon issued to the voters of the State. The results of our experience of the elective system were set forth with moderation and power, and in view of the facts and tendencies thus disclosed, the conviction was declared that the elective system, as applied to judges, "has neither inspired nor strengthened anything good among the people, but that it has lowered the dignity of the bench, weakened the force of law, impaired public confidence in the administration of justice, made criminals more numerous and bold, and life and character and property less safe." A vigorous appeal was therefore made for a return to the method of appointment by the Governor with the advice and consent of the Senate. An organized effort followed to educate the people on this subject. Official ballots had not then been adopted. So the Association printed and distributed a million ballots for use by

Attempt to return to appointive bench

the voters. But, unfortunately, as it seems to us, a large majority of the voters did not wish to take the selection of the judges out of the hands of the politicians, and, in answer to the questions submitted: 1. "Shall the offices of chief judge and associate judges of the court of appeals and of the justices of the supreme court be hereafter filled by appointment? 2. Shall the offices of the judge of the superior court of the city of New York, of the judge of the court of common pleas of the city and county of New York, of the judge of the superior court of Buffalo, of the judge of the city court of Brooklyn, of the county judge of the several counties of this State be hereafter filled by appointment?" about 320,000 votes were cast against, and only about 115,000 for, appointment. This decisive defeat of the proposed amendment apparently removed the question from consideration in the Constitutional Convention of 1894.

Had the result of this submission been different, one important branch of the Association's subsequent labors, the choice and conduct of judicial officers, would probably have been materially diminished. As it was, several years elapsed before it was necessary for the Association to investigate the conduct of a judge in this State. In 1880 charges against a judge of the Marine Court of the city were examined into by the Judiciary Committee, and on its report the Association directed that the Governor be requested to remove the accused officer. Nothing was done by the Governor, and in September of that year the judge died. In 1886 the Association presented to the Legislature charges against a Supreme Court justice in this district. These

Investigations of judicial conduct

were referred to the Assembly Judiciary Committee. That committee, after hearing the representatives of the Association, made a report to the Assembly, which exonerated the justice, but recommended an investigation into the administration of justice in New York City. The Assembly approved the exoneration, but refused to order the investigation. More serious issues were involved in the conduct of a Deputy Attorney General of the State who was shown in a pending judicial proceeding to have abstracted an election return in November, 1891, from the Comptroller's office, and who the following January had been appointed by the Governor to fill a vacancy in the Court of Appeals. When this election scandal was brought to the notice of the Association, a special committee of investigation was appointed. Of that committee of nine members, it is worthy of remark that six had been or afterwards became Presidents of the Association. On hearing the report of the committee the Association decided to transmit the report to the Senate and Assembly, and to ask those bodies to consider whether the conduct of the judge in question did not demand an exercise of the legislative power to remove him. Notwithstanding the damning character of the report the Legislature adjourned without having taken any action towards removing the implicated judge. That the indifference of the Legislature, however, was not shared by the bar of the State was shown by a communication addressed to this Association by more than a hundred members of the bar of the city of Buffalo expressing their approbation of the investigation and condemnation of the judge, and their grateful admiration of this Association's efforts to guard the honor of

the profession, the dignity of the bench and the due administration of justice. The second name on the list of the signers of that noteworthy communication was that of Mr. John G. Milburn, who is now the President of the Association. At the end of the following December the term of the accused judge expired, but another vacancy having in the meanwhile occurred, he was a candidate for reappointment to fill the vacancy during the year 1893. At a special meeting held in December, 1892, the Association declared its opinion that his reappointment was "eminently unfit," and respectfully requested the Governor to select some other person for the office. The Governor disregarded this protest, and for another year the highest court of the State was under the reproach of having a discredited member. In the autumn of 1893, the Democratic party thought itself strong enough to disregard the condemnation of the bar of the State, and nominated this same judge for a full term of fourteen years. Again the Association protested, and at a meeting held early in October took this emphatic action:

> "*Resolved*, That this Association urges upon every good citizen, without distinction of party, and especially upon every lawyer, the paramount duty of opposing to his utmost this attempt to reward unworthy conduct by a seat on the bench of our highest judicial tribunal."

That appeal to the people was successful. Mr. Edward T. Bartlett, a member of the Association since 1870, received a plurality of more than 100,000 votes, the entire Democratic State ticket was defeated, and the Court of Appeals was finally freed of an unworthy judge.

In 1890 the Association presented a memorial to the Legislature regarding the action of a judge of the Court of Common Pleas in a notorious divorce suit, but no action was taken on this by either House.

One other major judicial scandal was dealt with by the Association in 1905 and involved the alleged misconduct of a justice of the Supreme Court from the western part of the State, who had been assigned to the Appellate Division for the Second Department. Here again the acts charged did not arise in the performance of his judicial or professional duties, but were of so heinous a character as to compel the conclusion that the accused was morally unfit to hold judicial office. In substance, the charges involved successful attempts to defraud the Government of the United States. An investigation by a committee of the Association having seemed to show that the charges were well-founded, they were presented to the Legislature and the removal of the official asked. A majority of the Assembly, but not the two-thirds required by the Constitution, having voted in favor of such removal, the Senate took no further action. The State Bar Association and the Jamestown Bar Association participated actively in this investigation.

It was early recognized that not only must judicial scandals be removed when they occurred, but that their occurrence should be made less likely by bringing what influence was possible to secure the selection of proper candidates for the bench. The careful scrutiny of judicial nominations has thus been a constant function of the Association. The first opportunity the Association had to exert its power in this respect

Scrutiny of judicial nominations

was early in January, 1874, when a special meeting was called to protest against a nomination which the President of the United States had made to fill the vacancy in the Chief Justiceship of the Supreme Court, caused by the death of Salmon P. Chase. A copy of the action of the Association condemning this nomination was forwarded to the President and to each Senator. A few days later the nomination was withdrawn by the President and that of Morrison R. Waite substituted and confirmed. What that change in Executive action meant to the country was eloquently portrayed fourteen years later, when the bar of New York met to mourn the death of Chief Justice Waite.

In 1881 the by-laws of the Association were amended, and a Committee on Judicial Nominations was established, whose duty it was "to consider the fitness of candidates nominated or proposed to be nominated, by political parties or otherwise, for election or appointment to judicial office, or to any office connected with the administration of justice, and to confer on that subject with other organizations or with Nominating Conventions, and with power to recommend to the Association, at a special meeting or otherwise, such action in respect to candidates as they may deem necessary or proper."

Committee on Judicial Nominations

In accordance with these powers, the Committee on Judicial Nominations annually thereafter considered the nominations made to judicial office, and if the necessity seemed to exist, reported to the Association. Three general principles commended themselves in the treatment of the subject, the first being that the Association should not involve itself in partisan politics, the second,

that except in case of emergency an attempt to obtain the nomination of particular persons was inexpedient, and the third that where judicial officers had faithfully and ably discharged their duties, such officers should be re-elected. This last principle especially has ever since been advocated and with growing insistence. More than any other available method it tends to reduce the dangers of an elective judiciary. In Pennsylvania, where the judges are also chosen by vote, it has come to be the unwritten law that any judge, eligible for another term, who has shown himself competent and faithful is entitled to a renomination by both political parties,and to a reëlection without a contest. We can only hope that some day New York will give this principle the force of law. For a few years after 1881, the Committee on Judicial Nominations interpreted the new by-law to sanction the attempt, which sometimes succeeded, to obtain the nomination of desirable candidates. But later a narrower policy was apparently adopted, and the committee limited its efforts to reporting to the Association only nominations that were clearly unfit. As a result of this policy the business of the committee declined to such an extent that in January, 1898, a special committee was appointed to consider whether the Association could wisely increase its influence upon judicial nominations. The special committee recommended a broader interpretation of the powers of the Committee on Judicial Nominations, and as a first step advised that the latter committee act in season to enable the Association to take such steps as might be desirable in respect to candidates for judicial office at the ensuing November election. The Associa-

tion in May accepted this advice, and instructed the Committee on Judicial Nominations accordingly. That committee devoted itself industriously to the task. The term of two Supreme Court justices would expire at the end of the year, Justice Joseph F. Daly, a Democrat, who had served acceptably on the bench for twenty-eight years, and Justice William N. Cohen, a Republican, who had been appointed to fill a vacancy, and had already demonstrated his qualifications for the office. It was an excellent opportunity for the application of the Association's principle that capable judges should be retained. The committee conferred with the bar generally, and obtained the signature by three thousand, five hundred lawyers of a petition for the renomination of these two judges. This petition, amplified by the committee's own views, was presented to the various party managers and political conventions, but the Democratic convention refused to nominate either of the two judges. A determined effort was then made by the Association to secure their reëlection. A non-partisan committee of fifty was appointed, and a brisk contest ensued. A public mass meeting to protest against the Democratic rejection of the two judges was held, but both were defeated at the polls. Judge Daly's successful opponent, however, had 18,000 fewer votes than were cast for the rest of the Democratic ticket, and it is probable that this judicial issue again brought about the defeat of the Democratic State ticket.

In 1900, a protest was made by the Association itself against the nomination by the President of a judge of the United States District Court for the Western Dis-

trict of New York. As the judge in the Western District was in the habit of sitting a portion of each year in the Southern District, this nomination was deemed germane to the Association's work, and the protest was pushed. It was not, however, successful in preventing the confirmation of the nomination.

In 1902 Judge John Clinton Gray, of the Court of Appeals, a Democrat, whose term of office was about expiring, failed to receive a renomination by the Republicans. This omission was criticized by the Association, and a determined effort made to secure his reëlection. After a canvass of the entire State the effort was successful, and the State was thereby given the services of that able judge for another term. It was only by a narrow margin that the other candidates on the Republican ticket, with one exception, were elected.

A renewed attempt was made in December, 1905, to render the influence of the Association more effective, and the Committee on Judicial Nominations was asked to study the question afresh. Pending that examination, the community was faced with the fact that in 1906 ten new justices of the Supreme Court were to be elected in the county of New York. A general effort was therefore made to secure the nomination, by the coöperation of all the lawyers of the city, of fit candidates to fill these important offices. As a result a body of nine "Judiciary Nominators" were chosen, and these in turn selected and placed in nomination an excellent ticket. The Association did not originate this movement, but gave its hearty endorsement to the candidates so named. Unfortunately, they were not successful at

the polls, but the attention of the public was thus called in an informing way to the whole subject of judicial nominations.

A general revision of the by-laws was undertaken in 1910, and resulted, among other things, in the abolition of the Committee on Judicial Nominations and the transfer of its work to the Judiciary Committee. This feature of the general revision was first suggested in the annual report of the Judiciary Committee in January, 1910. Prior to that time the committee had been charged with the duty of observing the practical working of our judicial system and of recommending such changes therein as seemed desirable. This somewhat indefinite authorization had not produced an active program for the committee. In 1904, it conferred with the State Commission on the Law's Delays, and in 1907 it considered a rehabilitation of the Municipal Courts and the congestion in the calendars of the City Court. With these exceptions the committee seldom made a formal report to the Association. But under the amended by-laws the committee's powers were declared to include watching the practical working of the courts, both civil and criminal, and considering and conferring with other organizations and with nominating committees regarding the fitness of candidates for judicial office. The committee entered upon its new duties with marked energy and ability, and has in each year since continued to give those vitally important subjects prolonged and enlightened consideration. In 1915, a determined effort was made by the committee to secure the renomination by the leading political parties of Justices John Proctor Clarke and Sam-

Judiciary Committee

uel Greenbaum to the Supreme Court in the First District. A Non-Partisan Judiciary Committee was appointed and the desired object was accomplished. A similarly successful and State-wide effort, in which the State Bar Association and the New York County Lawyers' Association shared, to secure the renomination and reëlection of Judges Chester B. McLaughlin and Benjamin N. Cardozo to the Court of Appeals, was made by the Judiciary Committee in 1917, and in 1918 Justice Victor C. Dowling's renomination in the First District by the two leading political parties was brought about. In 1919, when the terms of Justice Joseph E. Newburger of the Supreme Court, a Democrat, and Justice Richard H. Smith of the City Court, a Republican, were about expiring, the committee's attempt to obtain their renomination by both parties failed owing to the Democratic party's refusal to nominate either Justice Newburger or Justice Smith. Once again the issue was taken by the Association to the people, and again the people vindicated the principle by reëlecting both of those faithful judges. At the same time most of the other candidates on the Republican ticket were elected. So for the fifth time, at least, the judicial issue which the Association raised had pronounced political results. The latest judicial question with which the committee has dealt was urging upon the Governor with successful result the reassignment to the Appellate Division of the First Department for the term beginning January 1, 1920, of Justice Frank C. Laughlin. All of the committee's action was, of course, taken with the full approval of the Association, but the labors of the committee have been largely increased in these later years by

the necessity of compliance with the complicated provisions of the Direct Primary Law.

It has been suggested repeatedly by the Judiciary Committee that decidedly better results could be obtained at the polls if the names of the candidates for judicial office were printed on the ballots separately from the party columns. It is probable that such a modification of the Election Law would be beneficial, but in the nature of the case the control by the bar over judicial nominations and elections is limited. It has always been the purpose of the Association to refrain from taking any partisan attitude and from entering into any purely political question. The judicious exercise of the power of professional opinion seems to be the strongest available influence. The fact is the present method of selecting candidates for judicial office, whether through the operation of the direct primary or by the choice of party conventions, is irremediably imperfect. As between the primary and the convention the advantage apparently lies with the convention, since the direct primary, in its present form, is not fitted to bring forward desirable candidates for the bench, and where nominations by the leading parties are obtainable, the primary requirements are needlessly involved. It seems difficult to escape the conclusion with which the Association began its existence that the administration of justice in this State would be much more effectively carried out if all the higher judicial officers were appointed by the Governor, either acting alone or with the concurrence of the Senate. In the present state of the popular mind, however, such a reform seems hardly practicable.

The correction of misconduct on the part of lawyers themselves is a gravely important function of the Association. Shortly after its organization, a Committee on Grievances was created, charged with the hearing of all complaints against members of the Association, and also all complaints which might be made in matters affecting the legal profession, the practice of the law and the administration of justice. These powers were not deemed by the committee to have sufficient breadth to include charges against lawyers who were not members of the Association. In the early days charges against members of the Association were almost unknown, and it was not until 1884 that such a complaint was made to the committee. Within the memory of some of the oldest members, the case of a noted lawyer who by a curious misunderstanding was asked to sign the original organization call, but who was believed to have been implicated in various unsavory judicial performances which were disclosed in the impeachment trials of the judges, was informally considered, but since he had become a member subsequent to the conduct complained of, it was not deemed advisable to attempt to discipline him on that ground. For similar reasons of expediency the conduct of certain non-member lawyers disclosed by the judiciary proceedings was not further investigated. But the Association stands ready always to defend its members when unjustly attacked. In one famous case arising in 1876, a distinguished member of the Association, and one of its founders, Mr. Charles O'Conor, appealed himself to the Association for an investigation of charges that had been made against

Discipline of lawyers

Committee on Grievances

him in some of the newspapers of the city. In substance, these criticisms were first, that having accepted the office of counsel for the plaintiff in the notorious Forrest divorce suit and agreed to act without compensation, and having received from various citizens of the city complimentary testimonials under the belief that his successful labors in the suit were gratuitously performed, he had subsequently presented and collected a bill for his services, and second, that this bill was exorbitant. Upon receiving Mr. O'Conor's appeal, the Association appointed a committee to arrange a tribunal to investigate the charges. This committee selected five prominent citizens of the city, of whom the chairman was the Honorable John A. Dix, former Governor of the State, and after a hearing, this tribunal unanimously exonerated Mr. O'Conor on both counts. The first charge was disproved by the testimony of competent witnesses, including his client in the case, and it was found that as to the second charge he had received for his services, covering a period of nineteen years and resulting in the vindication of his client's fair name and the recovery for her of property of the aggregate value of $221,000, the very moderate compensation of $13,000, in addition to reimbursement of $25,000 advanced by him to his client for her support pending the litigation.

In 1884 the Committee on Grievances was specifically authorized by an amendment of chapter XIV of the by-laws to investigate charges of fraud and of gross unprofessional conduct against lawyers who were not members of the Association, and against persons pretending to be lawyers. That committee was to report to the Executive Committee which, if it thought advisable, could appoint a member to

prosecute the case. This change in the by-laws made the Committee on Grievances more active. In the following year twelve complaints were investigated. Owing to the difficulty and delay experienced by the Executive Committee in securing prosecutors, the Committee on Grievances recommended in 1892 that the Association appoint one or more regular prosecutors. This suggestion was not then carried out, but chapter XIV of the by-laws was again amended in 1896, and by a further amendment in 1897 a member of the Association was appointed attorney for the committee, without pay. The business of the committee meanwhile was steadily increasing. By 1906 it had reached such size that it was deemed necessary to have an attorney devote his full time to the work. A member of the Association was chosen for that position, with a regular salary, and a downtown office was secured for the committee. By 1910, these quarters were outgrown. As the lease which the Association had made of Nos. 39 and 41 West Forty-third Street was to expire the next year, it was arranged to provide there accommodation for the committee. Not only did this give much more spacious and convenient headquarters for the committee, its staff of attorneys, stenographers and clerks, and for witnesses, but it also supplied a more dignified court room for the weekly hearings of the committee.

Meanwhile, charges which had been preferred to the committee against a city magistrate, were investigated and presented to the Appellate Division. After a hearing by that court the magistrate was removed from office.

Broader powers having been conferred on the committee by the by-law revision of 1910, charges made in

1913 against a Supreme Court justice in this district were, at the request of the Governor of the State, investigated by the committee. With the approval of the Executive Committee and by direction of the Association, the testimony in support of the charges was presented to the Governor and by him laid before the Legislature. The Joint Committee of the Senate and Assembly, however, after a hearing, dismissed the charges.

In the last ten years the powers of the committee have become better known and its labors have largely increased. In the courts and with the public it has come to be a matter of course to refer to the Association any questionable conduct of lawyers. The number of complaints against attorneys annually investigated by the committee during that period has ranged from five hundred and fifty-one to nine hundred and seven. In addition, more than a hundred complaints involving the administration of justice have been passed upon. Since 1905, more than eight thousand five hundred complaints against attorneys have been considered, and two hundred and sixty lawyers, in proceedings instituted by the committee, have been disciplined by the Appellate Division by disbarment, suspension from practice or censure. All this, of course, involves heavy annual expense, but it seems to be the unanimous opinion that it is the duty of the Association to pursue this important work with the utmost efficiency.

A summary of the usual procedure of the committee may be of interest. When a complaint against an attorney is presented, it receives preliminary examination by the attorney for the committee. If he deems the case to be one requiring investigation, a formal charge is drafted

and served upon the lawyer named in the complaint. A hearing is then had before the committee, at which the respondent is allowed to be represented by counsel and to cross-examine all witnesses. In the large majority of cases this painstaking consideration of the complaint establishes its insufficiency or brings about a satisfactory accommodation of the dispute between the attorney and his client. But if the evidence seems to justify further prosecution of the complaint, the record is submitted to the Executive Committee, and if that committee concurs with the Committee on Grievances, a petition in the name of the Association, setting forth the circumstances disclosed to the committee, is presented by its attorney to the Appellate Division of the Supreme Court. Notice of this application is given to the attorney involved. If the Appellate Division is of the opinion that a proper case has been made out, and no issue of fact is raised by the respondent, an order of disbarment, suspension or censure is entered. Where material facts are put at issue, the proceeding is usually sent to a referee. The parties having been heard before that official, he files a report, and on the application to confirm that report the Appellate Division, after again hearing counsel, renders its decision.

So thoroughly and with such discrimination is the difficult work of the committee performed, that its presentation of charges to the Appellate Division is ordinarily followed by that court's discipline of the accused attorney. The Association, acting through the committee, may thus fairly be regarded as an arm of the Supreme Court. Frequent appeals are taken or sought to be taken by the convicted attorney to the Court of Appeals, but in only one

case has the order of the Appellate Division been reversed. In one other case the appellant applied to the Supreme Court at Washington for a writ of *certiorari*, but this was denied.

In conducting this heavy mass of trial and appellate work, the attorney of the committee, who has ably filled that position for fourteen years, frequently needs the aid of counsel. Other members of the Association generously volunteer for this purpose, and in almost every case without fee.

Among the important accomplishments of the committee have been the permanent establishment of a higher standard for professional conduct. Abuses that had flourished for years without criticism were corrected. One of the first acts of the committee was to make clear the misconduct of using criminal processes to force a settlement in a civil suit. False or careless affidavits by attorneys, or the presentation of affidavits which were known to be false, resulted in a number of disbarments, and diminished wrongs of that sort. In the same way, the establishment of the principle that a lawyer might be disciplined for allowing his client to testify, on a trial, to what the lawyer knew to be false, has also had beneficial results. The fact that a lawyer could be disbarred for misbehavior, even though the relation of attorney and client did not exist between him and his victim, was another valuable demonstration of the committee. The conduct of accident suits against the street railway companies produced evils of two kinds—unprofessional methods in instigating such suits, and the improper treatment by the defense of witnesses for the plaintiff. These abuses

had become a public scandal, and their abatement by the committee was a genuine service. Many attorneys have been stricken from the roll whose admission was secured by false representations. The statute granting immunity to a wrongdoer who testifies for the State has been held not to shield a lawyer from disbarment for the acts as to which he has testified. All of this has been pioneer work Other corrupt practices have been either radically reduced or completely stopped. The committee has not only acted as an efficient prosecutor, but it has elevated the actual standards of the profession.

Nor has the effect of these endeavors been confined to the City of New York. The committee is frequently consulted by the representatives of other bar associations, and its standards of professional conduct and its disciplinary procedure have been described in scores of replies to inquiries on those subjects. In this way the influence of the Association's work has been felt all over the country.

No record of the activities of the committee, however, would be complete which did not show the large amount of time which the members give to their duties. Besides all their individual investigation and study, they are in the habit of sitting every Thursday afternoon in their court in Forty-third Street, taking testimony and considering cases. During July, August and September, these regular meetings are suspended, but all-day sessions are held during one entire week of July for the purpose of clearing the calendar of pending cases. In the extent of its labors, the Committee on Grievances surpasses every other committee of the Association. But of all the members of the committee, the present Chairman, who has

acted in that capacity continuously since 1902, has devoted himself most assiduously and constructively to the committee's task. To him and to his associates the highest praise is due. They are laboriously performing, week after week, and with conspicuous efficiency, a public duty of the greatest consequence.

Supervision of changes in statutory law

Another broad field of activity for the Association has included changes in the body of statutory law. Affirmatively this work involves the devising of needed additions to the existing statutes, and negatively the much greater task of criticizing and opposing the incessant attempts to enact undesirable laws. At the very outset a standing Committee on the Amendment of the Law was provided, which has since labored to carry out that essential branch of the Association's work. During the early years, there was no legislation of special moment to occupy the attention of the committee, but in 1880 it was faced with the proposed enactment of the so-called Field Civil Code. The threatening aspect of this scheme to change our legal system so radically, and the complexity of the subject, may justify a somewhat detailed statement of the episode.

In 1828 New York took an important step by including in a general revision of existing statutes, a codification of certain parts of the substantive law, notably in respect to land tenure, uses and trusts and other related subjects. The common law of England on this subject had slowly developed through the centuries, and it was felt by the revisers that in our new and different political and social conditions, the precise application of that mass of feudal growth to our own form of government should be defined.

The result was the Revised Statutes of 1828, and these remain in substance in our present body of statutory law and have been adopted in several of the Western States. It may be remarked, in passing, that the codification phase of the Revised Statutes of 1828 was vehemently opposed by James Kent, who, having reached the age of sixty years in 1823, had been compelled by the Constitution then in force to retire from the bench. The former Chancellor's views were shared by the great majority of the bench and bar. But the ardor of the three youthful and brilliant revisers overcame all opposition, and the draft of the general plan of revision submitted in 1825 by the youngest of them, Mr. Benjamin F. Butler, who was then twenty-eight years old, was adopted by his colleagues and ratified by the Legislature. Here, again, it may be doubted whether an effectively organized bar would not have prevented the inclusion in the revised laws of any attempt at codification.

With the revision of our Constitution in 1846, fresh impetus was given to the general codification idea, by a direction that the Legislature appoint three commissioners of codification. That appointment was made in 1857, the Messrs. David Dudley Field, Wm. Curtis Noyes and Alexander W. Bradford being named. In 1865 they submitted their final report of a proposed Civil Code, and for nearly thirty years this was almost annually pressed upon the Legislature for enactment. During all of that time Mr. Field was the protagonist of the measure, which was generally believed to have been substantially his work, and bent all of his energies and varied abilities in its behalf. It failed of

Opposition to Field Civil Code

adoption after several successive legislative attempts, and for a number of years was not pressed. In 1880, under the apparent sympathetic influence of the work of the then Commissioners of Statutory Revision, Mr. Field succeeded in getting his Code through both Houses, but it was vetoed by Governor Robinson. A somewhat altered form of the measure was introduced in the legislative session of 1881. This being brought to the notice of the Association at its regular meeting on March 8, 1881, by the Committee on the Amendment of the Law, the committee was instructed to consider the bill and report to the Association on March 15th. The committee then reported that while a careful revision of the existing statutes of the State would be of unquestionable benefit, an attempt to codify successfully the entire body of the common law would be impracticable and of great damage to the general public. This report was adopted by the Association, and in view of the capital importance and intricacy of the pending bill, a larger special committee was directed to appear before the proper legislative committees and urge the rejection of the proposed Code. For ten successive years the special committee faithfully carried out its instructions and at the end of each year reported to the Association. This report was invariably adopted and as a rule ordered printed and distributed throughout the State. Before the special committee could be heard in the 1881 session the Assembly passed the Code bill by a vote of eighty-three to three. By arrangement with the Judiciary Committee of the Senate a hearing was held April 21st and arguments against the bill were made by representatives of the Association and

in its favor by Mr. Field. As a result the bill was not reported out by the Senate committee before the Legislature adjourned in July. In December an urgent appeal for careful consideration of the proposed Code was sent to each member of the Legislature of 1882. Although the special committee was heard in the latter year by the Judiciary Committee of each House, the bill was reported favorably and subsequently passed by each House. An earnest remonstrance was addressed to Governor Cornell and he vetoed the measure. A year later, in October, 1883, the third annual report set forth that while elaborate and prolonged argument against the Code was made in the spring of that year in both legislative committes, each committee, by a divided vote, reported the bill favorably, but that no action on the bill had been taken by either House. In the 1884 session the contest was renewed over a somewhat modified Code. The Association's opposition was even more analytic and vigorous. The Assembly committee did not report the bill, and while it was reported favorably by the Senate committee it was defeated in the Senate. From the report of the special committee, presented in December, 1885, it appeared that another active contest had taken place in the 1885 Legislature. The Assembly committee reported the bill favorably, but the Assembly itself, after a discussion which revealed for the first time a conscientious and an intelligent consideration of the merits of the controversy, voted against the measure. The Senate committee also reported the bill favorably, but after its defeat in the Assembly no further action was taken by the Senate. The sixth annual report of the special committee submitted on December 14, 1886,

and the seventh annual report on December 13, 1887, recounted in each case the renewed efforts of the committee. The eighth annual report presented December 8, 1888, showed that earlier in that year another battle royal on the proposed Code had taken place in the Legislature. Repeated arguments were made before the Joint Judiciary Committee of the two Houses. Briefs in opposition were prepared by several members of the special committee and a thorough canvass made of the Legislature. Finally the measure was passed in the Senate without a vote to spare, but was subsequently defeated in the Assembly by a substantial majority. While it was then apprehended that the adoption of the Code would be urged upon the next Legislature, that apprehension was not realized. The special committee was nevertheless continued in December, 1889, when it made its ninth annual report. Its tenth annual report, presented in December, 1890, proved to be the last. No further attempt to enact the measure has since been made.

This chapter in the history of law demonstrates the learning and devotion of the Association's representatives. They succeeded in saving the people of the State from an enactment that instead of clarifying would probably have brought our substantive law into lamentable uncertainty, and swamped the courts with litigation. Only the lawyers could have benefited from such a labyrinth, and to their credit it should be noted that it was an association of lawyers that year after year stalwartly opposed the scheme until it was finally buried. A complete record of the Association's treatment of the measure during those ten years when its enactment hung in the balance, would fill

volumes. Some of our best minds gave the Code exhaustive study. Professor Theodore W. Dwight was for several years chairman of the special committee. Mr. James C. Carter, another member of the committee, was its unofficial leader throughout the contest, and again and again, by oral argument before legislative committees and by briefs, brought all his learning and superlative force to bear in preventing what he believed would be a public calamity. Other members of the committee and of the Association at large prepared monographs on various phases of the bill, and these arguments were printed and distributed throughout the State. The vastness of the subject, the research which it required, and the vigor with which the Code was pushed in political and legislative circles, gave its opponents a severe task, and it was by a narrow margin that they at last triumphed. Towards the end of his professional career, Mr. Carter recalled some features of that struggle. In the meantime he had broadened his inquiry into this subject of codification by making a philosophical study of the distinctions between written and unwritten law which he subsequently entitled "Law: Its Origin, Growth and Function." This he had intended to deliver in the form of a course of lectures before the Law School of his Alma Mater, Harvard University, but his untimely death in February, 1905, prevented. The manuscript of the lectures was published by his executors, and is a noble monument to that surpassingly great lawyer and man.

The doctrine of codification is a rather tangled web. New York State's attitude on the subject has not always been consistent. By the revision of 1828, as we have

seen, an attempt was ventured to codify the rules as to land tenure and other related subjects, and while this attempt was copied in several other States, it can hardly be said with confidence, after nearly a century of trial, that the attempt was either wise or successful. That learned law author, John Chipman Gray, was decidedly of the opinion that the experiment was a failure. In his work on The Rule Against Perpetuities (Third Edition, 1915), he says that whereas, before the adoption of the Revised Statutes there was only one reported case in New York involving the remoteness of a limitation, since that time there had been more than four hundred and seventy of such cases. A Penal Code, too, has been adopted in New York, but as that seeks to define so many *mala prohibita* as well as *mala in se*, it rests on a somewhat different basis. On the other hand, the proposed Code of Evidence has repeatedly been disapproved by this Association, and still remains unenacted. The Civil Code adopted in California in 1876 was largely based on the Field Code, but was afterwards criticized unsparingly by the most distinguished legal writer of that State, Professor John Norton Pomeroy. Yet California's experience did not deter several other States from making a similar experiment. While theoretically the argument in favor of codification so emphatically presented by its leading apostle, Bentham, and afterwards by Austin and other writers, is persuasive, the practical difficulties in the way of effective execution have, as Austin admits, hitherto proved insurmountable. As a mere matter of verbal expression, even temporary success seems hopeless, while in the case of the common law we have, of course, the im-

Doctrine of codification

mense added difficulty of accommodating permanent statutory definitions to the spontaneous development which has always characterized that body of law. So that the problem varies in different jurisdictions. In France, where special political considerations seemed at the time to justify the adoption of the Code Napoleon, it cannot be said that the measure has been wholly successful in reducing the uncertainty of law. The disregard by the Court of Cassation of the doctrine of *stare decisis* only magnifies this uncertainty. The Justinian Code and Pandects, as well as the Prussian Code, though for different reasons, have been termed equally vulnerable on the score of heterogeneousness and uncertainty. Nevertheless, the demand for codification in substitution for judiciary law has in recent years again become more audible, and no one can say where it will lead. But upon the whole, and especially from the point of view accessible a generation ago, and having in mind the proved imperfections of the Field Code, it may, we think, safely be repeated that the State owes a lasting debt to this Association for its protracted and successful struggle against that particular form of codification.

. . . . . .

THE SUPREME JUDICIAL COURT AND THE BOSTON COURT HOUSE.

By St. 1894, *c.* 453, it is provided that "Upon the completion of the Suffolk County Court House . . . the care, custody and control of such court house shall be in the justices of the Supreme Judicial Court who may for this purpose appoint a custodian and such other officers as they may deem necessary determine their term of service and may remove them and appoint others in their place. The compensation of such custodian and other officers shall be fixed by said justices and shall be paid by the City of Boston."

The statute does not provide that the "care, custody and control" of the Boston court house shall be in a custodian appointed by the Court. It is upon the Court, not upon the custodian, that the "care, custody and control" of the court house is imposed.

The constitutionality of St. 1894, *c.* 453, never has been called in question although it would seem that it is not altogether clear. If a statute had been enacted imposing upon the justices of the Supreme Judicial Court the "care, custody and control" not of the Suffolk County court house but of all the court houses of the fourteen counties of the commonwealth I cannot help thinking that some one would have raised the question of its constitutionality. Surely such an act would have imposed upon the Court executive duties and so would have come within the *Case of the Supervisors,* 114 Mass. 247. Again in case at some time in the future the persons employed by the justices in the "care, custody and control" of the Suffolk County court house or some of those persons should strike for higher wages (for example) would it not become apparent that St. 1894, *c.* 453, in putting upon the justices the duty of employing persons in the public service, imposes upon them executive and not judicial functions?

Possibly St. 1894, *c.* 453, has been looked upon as a case of

de minimis non curat lex. But however that may be, the attitude of the justices has been that the Court undertook the administration of the Boston court house in compliance with the mandate of the Legislature and this being so that they would continue to administer it until they were relieved of that duty by the General Court.

But the burden cast upon the justices by St. 1894, *c.* 453 is not within the class of *de minimis.* It is a burden of some importance. Moreover under the conditions which have obtained in recent years it is a burden which has been a troublesome one and one which in the immediate future is likely to become more troublesome still.

The principal burden of the "care, custody and control" of the Boston court house has fallen upon the Chief Justice of the Court. Doubtless some other arrangement might have been made. But during the terms of office of the present Chief Justice and his two immediate predecessors the main burden has been taken and carried by them in the first instance and after such questions have been decided as they have submitted to their associates it has been left to them to carry out the decision reached.

There are many different kinds of questions that have to be decided. For example, the engineers, the firemen, the elevator men, and the scrub-women, have not always been content with the wages fixed by the justices of the Court, and these matters of detail (with the bearing which the decision in the case in question has on the salary list as a whole) have had to be considered and dealt with.

In 1915 the elevator men and in 1917 the scrub-women appealed to the Legislature for an increase in their pay and the Legislature (seemingly forgetful of the fact that these matters had been left by St. 1894, *c.* 453, to the discretion of the justices of the Supreme Judicial Court) fixed the amount to be paid to both of these sets of employees.

The difficulties which have arisen in assigning rooms to those courts and to those officers who have to be housed in the court house have been many. It is not too much to say that the majority of the courts and officers under the roof of the Suffolk County court house are not satisfied with the quarters assigned to them by the justices of the Supreme Judicial Court. If the accommodations given to other courts

and to these officers can be judged of by those which the Supreme Judicial Court has assigned for its own occupation this dissatisfaction is merited. The quarters of the Supreme Judicial Court in the Suffolk County court house are inadequate for the efficient disposition of the work of the Court.

I venture to make the assertion that if a committee of the bar were asked to examine and report upon the quarters in the court house in which the Supreme Judicial Court is doing its work their report would support my assertion. I think they would go further and say that the facilities of the Court for doing its work efficiently would not compare with those of any law firm of even moderate standing.

The truth is that today there is not room in the Suffolk County court house for the proper accommodation of those who have to be provided for under its roof and the condition in this connection is getting worse and worse every year.

Another instance which illustrates the matters which have to be dealt with by the Court under St. 1894, *c.* 453, arose out of the explosion of bombs at the threshold of the Equity court room in the early part of the recent war. The possible dangers which that incident showed might arise led the Chief Justice to organize a system of closing many of the entrances to the building of guarding those which were left open and of seeing to it that the windows which were accessible from the street were protected by iron gratings. He did the work, but the time of the associate justices in consultation was taken up with the report which he made and a discussion of the measures taken.

I do not think that during the last twenty years a single twelve months has gone by in which some question or questions concerning the "care, custody and control" of the Boston court house has not been brought up for discussion in more than one of the eight yearly consultations of the Court. What would be thought of the efficiency of a firm of practising lawyers if they should take a lease of one of the largest office buildings in the city and if the seven partners should confer together several times a year upon the wages to be paid to the scrub-women, the elevator men, the engineers and firemen, and other persons employed by them, and upon the rooms to be assigned to the partners and to their employees and to the other tenants of the building?

It is perhaps not necessary to state that during the last twenty years the Supreme Judicial Court, by reason of the pressure upon it as the final court of appeal, has had to give up important work which it had theretofore done. For example, twenty years ago all or nearly all issues of fact allowed for trial by a jury in cases pending in the Supreme Judicial Court were tried at the bar of that Court. Formerly the only instances in which issues for a jury were sent to the Superior Court for trial were where they could be tried at an earlier day in that court or where counsel concurred in asking to have them sent there for trial. Today no issues of fact are tried by a jury at the bar of the Supreme Judicial Court. The pressure upon the Court which I have just referred to has been so great that it has been found necessary to send all issues of fact to be tried at the bar of the Superior Court. The amount of work of this kind which the Court has had to give up can be brought home by taking two instances of what the Court formerly did in the way of holding jury terms. In 1902 and 1906 the April jury term of the Supreme Judicial Court in Suffolk County lasted forty-three and twenty-one court days respectively.[1] These two instances are extreme. But in the past the April jury term in Suffolk County was a term which lasted several weeks every year. Today (as I have said) no cases are tried by a jury at the bar of the Supreme Judicial Court and there is no April jury term in Suffolk County or none which is worthy of the name.

The Court has had a like experience in the trial of equity cases. Twenty years ago many more cases were tried by the single justice sitting in equity than are so tried today. The number of cases sent to a master for trial is increasing and necessarily increasing year in and year out.

If it were relieved of the "care, custody and control" "of the Suffolk County court house" the Court would not thereby be enabled to take on the work which it has had to give up in recent years. But if it were relieved of the comparatively unimportant details involved in the "care, custody and control" of this court house (details which are executive and not judicial in character) the Court would have more time

[1]Note: During these terms the Court was engaged in the trial of cases without a jury as well as in the trial of jury cases.

to devote to the important judicial labors which were performed by it in years gone by, but which by reason of the increased pressure upon it as the Court of last report it has had to give up in recent years.

I wish to add that the Court has not asked and does not ask to be relieved of the burden of the work involved in the "care, custody and control" of the Suffolk County court house. I have written what I have written here on my own responsibility and not in any way directly or indirectly at the instigation of the Court or any justice thereof.

WILLIAM CALEB LORING.

JULY 10, 1920.

CRIMINAL PROCEDURE IN SCOTLAND.

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INTRODUCTION.

When the writer of this report was in England two years ago as a member of the committee sent to investigate the administration of the criminal law there, he was advised by Earl Loreburn, then Lord Chancellor, to make a study of the Scottish system. In the spring of 1912 the president of the American Institute of Criminal Law and Criminology commissioned the writer to make this study. The mission was endorsed by President Taft and the Attorney General, who provided the writer with letters of introduction. Two months were spent in attendance at the following courts in Scotland: The High Court of Justiciary at Edinburgh and on circuit at Glasgow, Aberdeen and Dumfries; the sheriff courts at Edinburgh and Glasgow; and the police courts of those cities. Many courtesies were shown the writer by the judges, lawyers and other officials, from whom he received much information regarding the procedure and practice. To Lord Dunedin, the Lord Justice-General, and Lord Kingsburgh, the Lord Justice-Clerk, the writer is particularly indebted.

Before commencing a detailed discussion of the criminal procedure it is advisable to present briefly a short sketch of the origin and historical development of Scottish law. Before the sixteenth century the laws of Scotland and England were practically identical, in each country being derived from the Anglo-Saxon and Norman inhabitants. Though the Celts formed a considerable portion of the population of Scotland, they left practically no trace in the law.

In the sixteenth century the jurisprudence of Scotland was largely changed by the introduction of Roman law, which accompanied the general revival of learning in Europe. At this time a great many of the Scottish lawyers received their training in continental universities. So strong was the Roman influence during the reign of James V. that he ordained

that no man should succeed to high estate who did not understand the Civil Law. The Court of Session which was established during the reign of this king was modeled after the Parliament of Paris. The extent of the influence of the Roman law during the seventeenth century may be shown by a quotation from Sir George Mackenzie's commentary on the criminal law:[1] "We follow the Civil Law in judging crimes, as is clear by several Acts of Parliament, wherein the Civil Law is called the Common Law. * * * And though the Romans had some Customs or Forms peculiar to the Genius of their own Nation: Yet their Laws, in Criminal Cases, are of universal use, for crimes are the same almost everywhere." Baron Hume, the leading commentator on Scottish criminal law, whose commentaries were published in 1797, regarded the Roman influence as being less extensive than set forth by Mackenzie. Hume said the influence was greater in the civil than in the criminal department, and said further: "Our whole judicial establishment and modes of trial are utterly remote from anything that was known among the Romans." These institutions, at that time, were, however, very similar to those in France.

By the treaty of union between Scotland and England in 1706, the Scottish laws and the jurisdiction of the Scottish courts were preserved, subject to change by Parliament. With few exceptions all the changes that have been made in the criminal law have been by special acts of Parliament, applicable only to Scotland. There has been very little general legislation in criminal matters. This fact, coupled with the further one that the Scottish decisions in criminal cases are not reviewable by the House of Lords, indicates the independent character of the Scottish criminal procedure, of which independence the people of that country are very proud. Though the Scottish law in civil cases, particularly the mer-

[1]The following treatises on Scottish criminal law and procedure were consulted in the preparation of this report:

Mackenzie, The Laws and Customs of Scotland in Matters Criminal (1678).
Hume, Commentaries on the Law of Scotland respecting Crimes (1797).
Burnett, Criminal Law of Scotland (1811).
Alison, Principles and Practice of the Criminal Law of Scotland (1831).
Macdonald, Criminal Law of Scotland (3rd ed. 1894).
Angus, Dictionary of Crimes and Offenses (1895).
Anderson, Criminal Law of Scotland (1904).
Renton and Brown, Criminal Procedure according to the Law of Scotland (1909).
Trotter, Summary Jurisdiction (Scotland) 1908 (1909).

cantile law, has by statute and decision been brought nearer to the English law, yet there is to-day no appreciable similarity between the two systems of criminal procedure. In England there is little knowledge of the Scottish law, and in Scotland general legislation applicable to the two kingdoms is not received with favor.

Towards the development of the law there has been somewhat the same attitude in this country as in Scotland. Professor J. Dove Wilson, in an article in the *Juridical Review*, says the following: "But when it came to speculation and to consequent free examination in search of what was best, the attention of the Americans could not be confined to such law as they had inherited."[1½] At the present, perhaps more than at any former time, attention in this country is directed to the legal systems of other countries. This fact, of itself, justifies a presentation of the Scottish criminal procedure, and its administration.

COURTS AND THEIR JURISDICTION.

Criminal jurisdiction in Scotland is of two kinds—*solemn*, where the prosecution is by indictment, and the court sits with a jury; and *summary*, where the prosecution is by complaint, and the court sits without jury.

The Courts exercising original criminal jurisdiction are:

1. The *High Court of Justiciary*, exercising solemn jurisdiction only. There is no appeal from the judgments of this court.

2. The *sheriff courts*, which have both solemn and summary jurisdiction. The judgments of these courts are reviewable by the High Court of Justiciary.

3. The *justices of the peace, burgh*, and *police courts*, which have summary jurisdiction only. The judgments of these courts are reviewable on questions of law by the High Court of Justiciary. The decisions of the justices of the peace are subject to appeal, both on law and fact, to the quarter sessions.

1. *The High Court of Justiciary.*

The High Court of Justiciary, which is the Supreme Court for the trial of criminal causes, is composed of thirteen

[1½] "Historical Development of Scots Law," 8 Jurid. Rev. 217.

judges with the official title of Lords Commissioners of Justiciary. These judges also compose the Court of Session, which is the Supreme Court in civil matters. The president and vice-president of the High Court are the Lord Justice-General and the Lord Justice-Clerk respectively. The former of these is also Lord President of the Court of Session.

After the Norman conquest a great officer of state called the Justiciar had universal jurisdiction over all legal controversies, civil and criminal. By statute in 1532, during the reign of James V., jurisdiction in civil causes was taken away from the Justiciar and vested in a College of Justice or Court of Session.[2] Originally each Justiciar, or Lord Justice-General, as he was later called, was commissioned directly by the Crown, but about the middle of the sixteenth century the office was granted as a hereditary right to the head of the house of Argyle. In 1628 this right was by contract resigned into the hands of the King, who thereafter generally appointed some great noble to the post.

The Justiciar was assisted by several deputies appointed by himself. As the Justiciar and his deputies were generally noblemen, often with no legal learning, they were advised by a clerk, who was a trained lawyer. This clerk prepared all the indictments and was the keeper of the records. The influence of this clerk was naturally great, and it steadily increased until in the latter part of the seventeenth century he gained a vote, and then a seat on the bench of the Justiciary Court with the title Justice-Clerk. This advance was formally recognized by an act of Parliament in 1672, which provided that the Justiciary Court should consist of the Lord Justice-General, the Justice-Clerk, and five of the judges of the Court of Session. The Lord Justice-General was made president of the Court, and the Justice-Clerk vice-president. During the period when the office of Lord Justice-General was held by successive noblemen the Lord Justice-Clerk was virtual head of the Justiciary Court. In 1830 the office of Lord Justice-

[2] "Because our Soverane Lord is maist desirous to have ane permanent ordour of Justice, for the universal weill of all his Lieges: And therefore tendis to institute one College of cunning and wise men, baith of Spiritual and Temporal Estate, for doing and administration of justice in all civil actions: And therefore thinkis to be chosen certaine persones maist convenient, and qualified therefore, to the number of fourteene persones, halfe Spiritual, halfe Temporal, with one President: The quhilkis persones sall be authorized in this present Parliament to sit and decide upon all actions civil and nane uthers to have vote with them, until the time the said College may be institute at mair leasure."

General was united with that of the Lord President of the Court of Session,[3] and in 1887 all the judges of the Court of Session were made Commissioners of Justiciary.[4]

The judges of the High Court of Justiciary are appointed by the Crown on the recommendation of the Lord Advocate. When a vacancy occurs the Lord Advocate by custom may accept the commission. This he is not likely to do unless it is the position of Lord Justice-General or Lord Justice-Clerk that is vacant. If the Lord Advocate does not accept the appointment, he often recommends the solicitor-general. In most cases the judges before appointment have had an extensive experience at the bar or on an inferior bench, or both.[5]

Upon the appointment of a new judge his commission is read by the clerk to the assembled court, after which the Lord Justice-General directs that he shall undergo a probation. He is directed to sit in different kinds of cases along with another judge. After a satisfactory report regarding his ability to preside in these cases, he is received as a member of the court.

The salaries of the Justiciary judges are as follows: Lord Justice-General, 5,000 pounds a year; the Lord Justice-Clerk, 4,800 pounds a year; and each of the other judges, 3,600 pounds a year.[6]

The High Court of Justiciary exercises original jurisdiction over all offenses for which the punishment may be death, penal servitude or imprisonment for more than two years.[7] The court sits at Edinburgh and on circuit[8] in the principal cities and towns of the Kingdom.[9] The times for holding the various circuits are fixed by Acts of Adjournal[10] passed by

[3]11 Geo. IV and 1 Gul. IV, c. 69, s. 18.

[4]50 and 51 Vict. c. 35, s. 44.

[5]The present Lord Justice General (Lord Dunedin) was successively advocate depute, sheriff of Perthshire, solicitor general and Lord Advocate. The Lord Justice Clerk (Lord Kingsburgh) was successively sheriff of Ross, Cromarty and Sutherland, solicitor general, sheriff of Perthshire and Lord Advocate.

[6]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 45.

[7]The theoretical jurisdiction of the Court is broader. Hume says: "In point of extent, its jurisdiction in the trial of crimes may be said to be almost universal. It is hardly subject to any limitations, with respect to the magnitude of the cause of complaint; and is open alike for the trial of the highest crimes and the more venial offenses" (Vol. II, p. 31).

[8]The Act of 1887 provides that every sitting of the Justiciary Court on circuit shall be a sitting of the High Court of Justiciary. 50 and 51 Vict. c. 35, s. 44.

[9]There are three circuits: North, South and West.

[10]The judges of High Court of Justiciary have the power to enact rules governing the procedure in that court and inferior courts. Such enactments are called Acts of Adjournal.

the court. Extra sittings may be had, if necessary, upon the requisition of the Lord Advocate. For many years it was customary in each trial at Edinburgh for three judges to sit, and on circuit for two, but now a single judge sits in all cases.

The sessions of the High Court in Edinburgh are held in the old Parliament House, described by Scott in the "Heart of Midlothian." It was formerly the custom to open the court with great ceremony, "fencing the court," but this is now abolished.

The High Court of Justiciary has a broad common law power to declare and punish new crimes, there being no rule against *ex post facto* laws. Hume says: "Our Supreme Courts have an inherent power as such competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature; though it be such which in time past has never been the subject of prosecution."[11] Alison, in his Principles, says: "By the common law every new crime, as it successively arises, becomes the object of punishment provided it be in itself wrong, and hurtful to the persons or property of others."[12] The difference between the common law powers of the Scottish court and those of the English courts, which do not generally extend beyond the case of misdemeanors, may be well shown by the following cases. In England in 1822, the question arose whether it was rape to obtain connection with a married woman by impersonating her husband. The court held eight to four that it was not,[13] and it required a statute to make this particular act criminal. A similar case in 1838 came before Gurney, B., in *Regina* v. *Saunders*,[14] who said to the jury: "Before the passing of a very recent statute I should have had to direct you to find a general verdict of acquittal." He further says, "although in point of law this was not a rape, I consider it one of the most abominable offenses that can be committed," yet he had no common law power to punish it. When a similar case arose in Scotland the court without hesitation pronounced the act criminal and punished the offender. In Fraser's case[15] in 1847 the accused was indicted for (1) rape, (2) assault com-

[11]Vol. I, p. 12.
[12]P. 624.
[13]*Rex.* v. *Jackson*, Russ & Ry. 487.
[14]8 C. & P. 226.
[15]Arkley 280.

mitted with intent to ravish, and (3) fraudulently and deceitfully obtaining access to and having carnal relations with a married woman. The court rejected the first two charges, but held that the third was good, and the accused was convicted and sentenced to 20 years' transportation. In a similar case[16] in 1858 the Court said: "If it does not amount to rape and to no other nominate offense, it is an offense *per se.*"

Embezzlement, obtaining property by false pretenses, and other fraudulent dealings with property, which in England and this country are criminal only by statute, are common law crimes in Scotland, under the names of "breach of trust" and "falsehood and fraud," respectively. This common law power of the courts is said by Hume to be advantageous for the following reasons: "Because all statutes are liable to be partial and defective in their description of new offenses; and thus the transgressor finds the means of eluding the sanction, and the law itself falls into contempt. But it is also a merciful course to the offender: Because the crime being censured on its first appearance and before it has become flagrant or alarming to the community, is restrained at that season by far milder corrections, than are afterwards necessary to be applied to it, when the growing evil has come to require the passing of an express law in that behalf."[17] The present Lord Justice-General said this power of the court must be exercised with a wise discretion. If the court should go too far in declaring acts hitherto lawful to be crimes, the effect of the decision would be counteracted by the Secretary for Scotland, who on behalf of the Crown would exercise the pardoning power.

There is no appeal from a judgment or sentence of the High Court, but the court exercises appellate jurisdiction over the other courts, three judges constituting a quorum.

2. *The Sheriff Court.*

The office of sheriff was created by the King, during the early days of the Scottish monarchy, for the purpose of exercising and preserving his authority against the rival powers of the local lords. One of the most powerful of these in each county was generally persuaded to accept the appointment,

[16]Sweenie, 3 Irv. 109.
[17]Vol. I, p. 12.

which became hereditary in his family. The sheriff thus became the local representative of the King in all matters, judicial and administrative. The judicial functions were in time delegated by the hereditary sheriff to a depute who was a trained lawyer. The hereditary office was abolished by the Heritable Jurisdictions Act of 1747,[18] and the sheriff depute soon became sheriff. By the Sheriff Court (Scotland) Act of 1870[19] the thirty counties of Scotland were combined into fifteen sheriffdoms.

The sheriff, who is appointed for life by the Crown, on the recommendation of the Secretary for Scotland, continues to exercise both administrative and judicial functions. He is the chief official in the county and on formal occasions takes precedence of all except members of the royal family.

The qualification for the office is five years' standing as an advocate or sheriff-substitute.[20] With the exception of the sheriff of the Lothians and Peebles, who sits at Edinburgh, and the sheriff of Lanarkshire, who sits at Glasgow, the sheriff need not reside in his sheriffdom. He continues his practice before the High Court and Court of Session, going to the county when necessary to perform his various duties there. In the absence of the sheriff the judicial duties are performed by a sheriff-substitute, who is resident and local. He must be an advocate or law agent of five years' standing,[21] and is not permitted to engage in any other business. Up to 1877 the sheriff-substitute was appointed and paid by the sheriff. Since then the appointment is by the Crown. The sheriff has the power of appointing certain honorary substitutes for the purpose of performing incidental and formal duties if the sheriff-substitute is compelled to be absent from the county. There are 5 sheriffs and 50 sheriff-substitutes. The sheriff at Edinburgh receives 1,800 pounds annually, and the sheriff at Glasgow 2,000 pounds. The salaries of the other sheriffs, who also practice, range from 700 pounds to 1,000 pounds.[22]

The sheriff has both solemn and summary jurisdiction. In exercising the former the limit of his power to punish is imprisonment for two years. In summary cases, on convict-

[18]20 Geo. II c. 43.
[19]33 and 34 Vict. c. 86.
[20]Sheriff Court (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 12.
[21]Sheriff Court (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 12.
[22]Sheriff Court (Scotland) Act, 1853 (16 and 17 Vict. c. 80), s. 37.

ing any person of a common law offense, he may impose a fine not exceeding twenty-five pounds, or may imprison with or without hard labor for a period not exceeding three months.[23]

The sheriff has also the following power to punish:

"Where a person is charged with any offense inferring dishonest appropriation of property, or attempt thereat, aggravated by at least two previous convictions of any such offense, or where a person is charged with any offense inferring personal violence aggravated by at least two previous convictions of any such offense, he may on summary conviction by the sheriff, be sentenced to imprisonment for any period not exceeding six months with or without hard labour."[24]

In practice most of the summary cases and many of the jury cases are tried by the sheriff-substitute. Besides the trial of cases it is the duty of the sheriff to grant warrants for apprehension and to commit for further examination or for trial where a case cannot be disposed of summarily. The arraignment of an accused on indictment and his plea thereto, whether the trial will be by the High Court or the sheriff is before the sheriff, such proceeding being known as the "first or pleading diet."

"The sheriff has a concurrent jurisdiction with every other court within his sheriffdom in regard to all offenses competent for trial in such courts."

3. *Justice of the Peace Courts.*

The office of justice of the peace was established in the reign of James V. to aid in preserving the King's peace within the counties. Formerly the justices were landed proprietors but by an act of Parliament in 1906[25] this qualification was abolished. No legal training is requisite for this office and no remuneration is received.

Justices of the peace are appointed by the Crown and have jurisdiction at common law to try summarily petty crimes constituting a breach of the peace. They also exercise a summary jurisdiction under statutes of an administrative character pertaining to such matters as roads and licensing.

[23]Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), sec. 11.
[24]Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), s. 12.
[25]Justices of the Peace Act, 1906 (5 and 6 Edw. VII. c. 16), s. 1.

In most cases two or more Justices sit. The decisions of the Justices are subject to review both as to law and fact by the quarter sessions, composed of a full bench of Justices. Their decisions are also reviewable on questions of law by the High Court.

Burgh and Police Courts.

"The magistrates of every royal burgh have the care of the King's peace within their bounds; and repress, by suitable punishments, the inferior transgressors against the quiet, police, or good order of the town."[26] The magistrates, who are generally called "bailies," are elected by the town council from amongst their own number.[27]

The jurisdiction of the magistrates within the burgh formerly corresponded to that of justices of the peace in the county. In 1892 a general police act for all cities in Scotland except Edinburgh, Glasgow, Aberdeen, Dundee and Greenoch (each of which cities has a special police act of its own) was passed.[28] By this act police courts were established in the burghs and the jurisdiction of the burgh courts was also regulated. The judges in the police court are past magistrates, i. e., they have held the office of magistrate and are still members of the town council. The magistrates and police judges are laymen and are advised on ordinary points of law by the clerk. If a question of law arises which cannot readily be settled by the clerk, an official called the legal assessor is called in. He is an advocate who has the duty *inter alia* of advising the magistrates and police judges in legal matters. The police judges rotate, each one generally serving for a period of two weeks. In Glasgow there is a permanent stipendiary magistrate, an advocate, who acts as police judge, and devotes all his time to the duties of his office. This is preferable to the system of lay magistrates. Certain confusion arises from the lack of legal knowledge on the part of such magistrates; and from the fact of the constant change in the occupants of the bench, it is impossible to have a permanent policy with reference to the conviction and punishment of the offenses coming within their jurisdiction. For instance, a particular magistrate in one of the large cities

[26]Hume, Vol. II, 270.
[27]Town Councils (Scotland) Act, 1900 (63 and 64 Vict. c. 49), s. 56.
[28]Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55).

will not convict a prostitute on the charge of importuning without the testimony of the person importuned. His successor on the bench convicts on the testimony of the police who observed the importuning. Since it is difficult to obtain the testimony of the person who has been importuned, the police make no arrests for this offense during the sitting of the first magistrate, but the arrests are frequent when the second presides. The punishment imposed by the different magistrates for this offense also varies considerably.

THE LEGAL PROFESSION.

There are two classes of lawyers, advocates and law agents. The advocates, as the name indicates, are those who plead before the court in the trial cases. An advocate may plead in any court in Scotland, and is the only one entitled to appear in the High Court of Justiciary and the Court of Session. The qualifications for advocates are prescribed by the Faculty of Advocates, an ancient society election to which is the only method of becoming an advocate. Candidates are required to pay a large fee and must undergo an examination conducted by a committee of the Faculty. A strict supervision is exercised over its members by the Faculty, which has the power to disbar for improper conduct. An advocate is not permitted to act directly for clients, but must be instructed by a law agent.

Law agents constitute the "client caretaking" branch of the profession. They are also entitled to plead in any of the courts except the Supreme Courts. The qualifications for law agents are fixed by acts of Parliament and various Acts of Sederunt, passed by the Court of Session; and admission as a law agent is granted only by the Court of Session upon the petition of the applicant. The court may strike a law agent from the rolls for misconduct.

There are two important societies of law agents, the Writers to the King's Signet and the Society of Solicitors in the Supreme Courts. Special qualifications and additional fees are required for membership to these societies, and the members enjoy certain privileges.

Consultations between advocates and law agents take place in the great hall of the Parliament House. Here the young barrister waits for his first brief, and here the King's

Counsel is consulted by the Writer to the Signet. Robert Louis Stevenson in his "Picturesque Notes of Edinburgh," describes this hall where he for a time walked briefless. "A pair of swing doors gives admittance to a hall. * * * This is the 'Salle des Pas-Perdus' of the Scottish Bar. Here by a ferocious custom, idle youths must promenade from ten till two. From end to end, singly or in pairs, the gowns and wigs go back and forward. Through a hum of talk and footfalls, the piping tones of a Macer announce a fresh cause, and call upon the names of those concerned. Intelligent men have been walking here daily for ten or twenty years without a rag of business or a shilling of reward. In process of time they may, perhaps, be made the Sheriff-Substitute and Fountain of Justice at Lerwick or Tobermory."

In a long corridor adjoining the hall are great rows of wooden boxes each with a metal name plate. In these boxes the advocates keep the papers of the cases they are conducting.

LEGAL AID FOR POOR PRISONERS.

For many centuries in Scotland a person accused of crime has been entitled to the benefit of legal advice in all cases, and if unable to procure such advice, it is furnished him. Even in civil cases counsel have been provided for poor persons. A statute during the reign of James I. in 1424 provided:

"And gif there bee onie pure creature, for faulte of cunning or dispenses, that cannot or may not follow his cause, the King for the love of GOD, sall ordaine the judge, before quhom the cause suld be determined, to pur-wey and get a leill and a wise Advocate, to follow sik pure creatures causes."

Legal advice is furnished indigent prisoners not only at the trial but throughout the entire proceedings. This results in considerable advantage to the prisoner and in great saving of time to the courts. In cases where resistance is hopeless, or is likely to make the accused's case worse than appears in the indictment, he is advised to plead guilty. In cases of doubt the defense is carefully prepared and presented in proper manner.

The persons who represent poor prisoners are not left to

haphazard choice but are regularly chosen and appointed. Each year six members of the Faculty of Advocates are appointed to be advocates for the poor. The Writers to the Signet and the Solicitors of the Supreme Court each appoint four poors' agents. Within each sheriffdom the sheriff annually orders that the law agents shall select agents for the poor. On circuit advocates of less than three years' standing are given cases by the local poors' agent. In Edinburgh and Dundee the town councils provide public defenders to represent poor persons in the police courts.

When a poor prisoner has been advised by the poors' agent to plead not guilty, the agent prepares the defense and secures the precognitions. If the trial is in the sheriff court the agent represents the accused there. In the High Court one of the advocates for the poor conducts the defense. If the charge is a serious one the Dean of the Faculty of Advocates, on application of the advocate for the poor, will assign a senior advocate, who must serve. The extent to which the poor prisoner's rights are protected may be shown by a case on circuit where there happened to be no counsel in attendance. The judge ordered the local sheriff to represent the prisoner, who was charged with theft.[28a]

Methods of Prosecutions and Prosecutors.

PRIVATE PROSECUTION.

In Scotland, as in England, the earliest form of prosecution was at the instance of the party injured. This remained the only method till the sixteenth century. In 1587 the King's Advocate was authorized by act of Parliament[29] to prosecute in cases where the injured party failed to act.

The first formal step in a private prosecution was the filing, with the clerk of the Justiciary Court, a bill, praying the Court to grant criminal letters, these being both the summons to the accused to appear, and the formal charge against him. After the power of the Lord Advocate increased it was necessary for the private prosecutor to seek his concurrence

[28a] Hannah, 1836, 1. Swin. 289.

[29] Statute of James VI in 1587, c. 65, provided "That the thesaurer and advocate persew slaughters and utheris crimes, althoucht the parties be silent, or wold utherwayes privily agree." Hume is of the opinion that the King's Advocate prosecuted in trials for such crimes as treason and sedition before the above statute was passed. Hume, Vol. II, p. 130.

to the bill, which could be refused only for proper cause. If the Court was of the opinion that the bill stated a criminal offense against the accused, the criminal letters were granted. These became the basis of the prosecution, which was conducted throughout by private counsel, instructed by the private prosecutor's law agent.

From the time that the Lord Advocate became active in prosecuting the number of private prosecutions fast diminished and soon the practice fell into almost complete disuse, the theory of public prosecution becoming accepted as a fundamental principle of criminal jurisprudence. A leading writer says in 1894: "Private prosecution, except in summary cases, is now unknown in practice."[30] A similar statement is made in a book on criminal law published in 1904.[31] Notwithstanding this accepted practice, a private prosecution was instituted and successfully carried through in 1908 in the much discussed case of *Coates* v. *Brown*. In this case the Lord Advocate refused to prosecute and refused his concourse to the bill for criminal letters.[32] The Court granted criminal letters and the private prosecutor was allowed to proceed independently of the Lord Advocate. The revival of private prosecution caused certain criticism, but it is believed by some that it was done to meet any exigencies that may arise in the administration of justice due to increased commercial trickery and labor agitation.

There has not been a private prosecution since the case of *Coates* v. *Brown*. In the early part of 1912 a prominent manufacturer of ships' compasses claimed that one of his employes had made copies of certain patterns and models for the purpose of using these in manufacturing compasses in competition with his employer. The Lord Advocate was asked

[30]Macdonald on the Criminal Law (3rd ed.), 281.

[31]Anderson, Criminal Law of Scotland (2nd ed.), 249.

[32]"My Lord Justice-General, Lord Justice-Clerk and Lords Commissioners of Justiciary, unto your Lordships Mean and Complain—J. & P. Coats, Limited, etc., upon David Brown, coal exporter, Glasgow, etc. *That Albeit* by the laws of this and of every other well-governed realm, *Falsehood, Fraud* and *Wilful Imposition* is a crime of a heinous nature and severely punishable: *Yet True It Is And Of Verity* that the said David Brown is guilty of the said crime actor or art and part: In So Far As******". It was then charged that David Brown had contracted to deliver coal of a certain quality to the petitioners, that he procured from the colliery company a certificate of the shipment of such coal which he knew to be false, and obtained money on the faith of this certificate. The Lord Advocate refused to prosecute or to grant his concurrence on the ground, not that the charge was irrelevant, but because the facts were such, that conviction was improbable.

to prosecute and on his refusal, a private prosecution was threatened. This was blocked, however, for the time being at least, by an action of slander instituted against the manufacturer by the accused employe.

PUBLIC PROSECUTION.

The Lord Advocate and His Assistants.

The almost universal form of prosecution in the High Court and the sheriff court with jury, is by indictment at the instance of the Lord Advocate. There is no grand jury in Scotland, the indictment being found by the Lord Advocate, who may prosecute or not entirely at his discretion. The Lord Advocate, who is one of the most important officials connected with the administration of justice, is appointed by the Crown from the Faculty of Advocates. He has a seat in Parliament, and is a member of the ministry of the day, going out with his party. In addition to his duties as public prosecutor, he performs many functions of a legislative and administrative character. He initiates and introduces in Parliament the legislation relative to criminal matters in Scotland and he appoints and controls the lesser officials of prosecution. He does not personally attend in court except in cases of very grave importance. Prosecutions in the High Court are conducted by the solicitor-general for Scotland, who in criminal matters acts as depute of the Lord Advocate, and by certain assistants called advocates-depute. These are members of the Faculty of Advocates and received their appointments from the Lord Advocate. They are not debarred from private practice consistent with their official duties. There are four regular and two special advocates-depute. One of the four prosecutes in Edinburgh and the other three in the different circuits. An extra depute is appointed to prosecute on the western circuit at Glasgow, where it is customary for two judges of the High Court to sit. The other special depute takes charge of certain important jury cases in the sheriff courts, the ordinary prosecutions there being conducted by the procurate-fiscal. The Lord Advocate and solicitor-general, when prosecuting in person, have the privilege of pleading inside the bar. The Lord Advocate receives a salary of 5,000 pounds a year and the solicitor-general receives 2,000 pounds. The salary of each of the regular advocates-depute is 700 pounds a year,

When the position of Lord Advocate becomes vacant, the solicitor-general, if he happens to be a member of Parliament, is usually appointed Lord Advocate. The advocates-depute have the chance of steady preferment so long as the Lord Advocate's party continues in power.

It was urged in a recent editorial in one of the Scottish legal periodicals that hereafter the appointment of the advocates-depute should not depend upon party affiliation.

The solicitor of the Lord Advocate's department is the Crown agent. He is the head of the Crown office at Edinburgh, and has charge of the records of criminal prosecutions. He is appointed by the Lord Advocate and goes out of office with him. The permanency of the Crown office is preserved by several clerks who continue office through the different governments. The highest permanent official connected with the Lord Advocate's department is the chief clerk in the Crown office.

Reports and precognitions from the procurators-fiscal are sent to the Crown office and are then submitted to Crown counsel, who decide what proceedings shall be taken. In practice Crown counsel generally consults with the Crown agent's chief clerk, who from long experience is familiar with all the points of procedure.

The Crown agent or his chief clerk acts as law agent at the trial of all criminal cases before the High Court of Justiciary at Edinburgh.

The Procurator Fiscal.

In each sheriffdom there is a prosecuting official called the procurator-fiscal. The early sheriffs established the office for the collection of the fines and forfeitures to which they were entitled. At a later period the duty of prosecuting in the sheriff court under the direction of the sheriff was delegated to the procurator-fiscal. As the power of the Lord Advocate increased the procurator-fiscal was brought under his control and direction, and by the act of 1907[33] the power of appointing the procurator-fiscal, who is generally a law agent, was transferred from the sheriff to the Lord Advocate, whose depute he now is. A procurator-fiscal can be removed from office only by the Secretary for Scotland for inability or mis-

[33]Sheriff Court (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 22.

behavior, upon a report by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.[34] This means practically a life appointment. The procurators-fiscals at Edinburgh and Glasgow have had long and distinguished terms of service. The former, jointly with the procurator-fiscal of Fifeshire, is the author of one of the leading books on criminal procedure. A judge of the Justiciary Court, speaking of the procurator-fiscal of Glasgow, said that several of the judges of that court, when advocates-depute, were indebted to the procurator-fiscal for much information and advice.

The procurator-fiscal prosecutes before the sheriff, sitting either with or without jury. Where a crime has been committed in the sheriffdom, it is the duty of the procurator-fiscal to conduct an investigation. He has the power of compelling the attendance of witnesses whom he examines privately, in an *ex parte* proceeding. His position in this respect is similar to that of the *juge d'instruction* of France. The statements of the witnesses to the procurator-fiscal are reduced to writing and are known as the precognitions. These are referred to Crown counsel, who decide whether an indictment shall be brought, and if so in what court it shall be tried. If the indictment is set for trial in the sheriff court, the procurator-fiscal prosecutes, except in rare cases of importance, where an advocate-depute takes charge of the case. When an advocate-depute prosecutes either in the High Court at Edinburgh or on circuit, or in the sheriff court the procurator-fiscal who conducted the investigation acts as law agent. The procurator-fiscal collects the fines and forfeitures in the sheriff court. It is also his duty to investigate all deaths of a sudden, accidental or suspicious character.

Prosecutions before justices of the peace are conducted by the procurator-fiscal of the justice of the peace court. They are appointed by the justices at quarter sessions.

The Burgh Prosecutor.

Prosecutions in the burgh and police courts are conducted by a burgh prosecutor. He is appointed by the Commissioners of Police,[35] who are really the Town Council.[36] He is gen-

[34]Sheriff Court (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 23.

[35]Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), s. 461.

[36]Testimony of Lord Advocate Shaw before the Royal Police Commission, 1907, p. 1214.

erally a law agent; in Edinburgh he is an advocate. The prosecutor is not permitted to engage in any other business. The salary varies in the different cities; the prosecutor in Glasgow receiving about $3,500.

It lies in the power of the burgh prosecutor to decide whether he will prosecute or not, and all complaints are in his name. Unlike the procurators-fiscal in the county he is not subject to the control or direction of the Lord Advocate. In Glasgow, where there are nine police courts, the lieutenants of police act as assistants to the burgh prosecutor.

Solemn Procedure.

Procedure on indictment is in part regulated by the Criminal Procedure Act of 1887,[37] of which the present Lord Justice-Clerk, when Lord Advocate, was the author, and by certain sections of the Summary Jurisdiction Act of 1908.[38]

PROCEEDINGS PRIOR TO TRIAL.

Apprehension and Commitment.

Arrest for examination may be either with or without warrant. A warrant for arrest is issued by a magistrate upon petition, which is generally in writing but need not be under oath, unless the magistrate so requires. The petition contains a statement of the charge. Arrest does not always follow the issuing of a warrant, as it is permissible to deliver a copy of the petition and warrant to the accused and inform him of the time and place of the examination warning him that if he does not appear he will be apprehended. Certain special acts provide for citation of the accused, viz., summoning him to appear for examination.

After making an arrest the officer should warn the prisoner that anything he says regarding the charge may be used in evidence against him. Voluntary statements made by the prisoner after being thus warned are admissible in evidence. Interrogations of arrested persons by the police are forbidden and confessions and admissions obtained in this way are inadmissible in evidence. A leading author on evidence says, "Nor will it render such examinations admissible that the prisoner was told he was at liberty to decline answering, for

[37] 50 and 51 Vict. c. 35.
[38] 8 Edw. VII. c. 65.

the police authorities are not permitted to examine him without the protection of a magistrate."[39] In this way "third degree" examinations by the police are prevented. Evidently the rule was not so strict a century ago, for in a case in 1858 the Lord Justice-Clerk (Inglis) said: "I was the first who many years ago pressed on the Court the necessity of putting a stop to what had been allowed to go too far, viz., the system adopted by police-officers of questioning prisoners after apprehension."[40]

After arrest the accused is taken without delay before a magistrate—in practice the sheriff-substitute—for examination. This examination is private and until 1887 the accused was not allowed to have legal advice. The accused after being informed of the charge and being warned that anything he says may be used against him and that he may decline to answer is questioned by the magistrate or by the procurator-fiscal in the magistrate's presence. His answers and any further statements made by him are written down by the clerk and are signed by the accused and the magistrate, and attested by witnesses. The statements of the accused, known as his *declaration*, were according to Alison for the "double purpose of giving him an opportunity of clearing himself in so far as he can by his own allegations, and explaining any circumstances which may appear suspicious in his conduct, and of affording evidence on which the magistrate can with safety proceed in making up his mind whether or not to commit for trial."[41] At the trial the declaration is generally read to the jury by the clerk of court at the close of evidence for the prosecution.

According to the act of 1887 a person immediately after arrest is entitled to secure the services of a law agent, and to have a private interview with him before examination on declaration, at which the agent may be present.[42] When a serious offense is charged the examining magistrate should inform the accused of his right to consult a law agent. Following are the declarations in the Monson case (1893) and the Slater case (1909):

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[39]Dickson on Evidence, s. 347.
[40]*Lewis* v. *Blair*, 1858, 3 Irv. 16, 21.
[41]Allison's Practice, p. 131.
[42]Sec. 17.

"Judicial declaration, dated 31st August, 1893. At Inveraray, the 31st day of August, 1893. In presence of John Campbell Shairp, Esquire, advocate, Sheriff-Substitute of Argyllshire:

"Compeared a prisoner, and the charge against him having been read over and explained to him, and he having been judicially admonished, Mr. Dugald M'Lachlan, writer, Lochgilphead, and Mr. Thomas Lindsay Clark, law agent, Edinburgh, agents for the prisoner, being present, and being thereafter examined thereanent—*declares*: My name is Alfred John Monson. I am thirty-three years of age, and I am married. I have no profession, and at present reside at Ardlamont House, Argyllshire. I have to say that I am not guilty of the charge made against me, nor was I with Mr. Hambrough, nor within sight of him, when the accident happened. Therefore I cannot explain how it happened. Under the advice of my law agent, I decline to make any further declaration at present. All which I declare to be truth."

(Signed) Alfred John Monson.
(") J. C. Shairp.

J. C. Maclullich,
Thos. M'Naughton,
John Campbell,
David Stewart,
} Witnesses.

"My name is Oscar Slater. I am a native of Germany, married, thirty-eight years of age, a dentist, and have no residence at present.

"I know nothing about the charge of having assaulted Marion Gilchrist and murdering her. I am innocent. All of which I declare to be truth."[43]

The accused may refuse, if he wishes, to make a declaration, in which case he is at once committed for further examination. In practice an accused is not likely to be advised by his agent to make a declaration unless he has something to state which will tend to clear him at once of the charge.

Where the prisoner has made a declaration and the magistrate does not consider this sufficient cause for ordering the prisoner's immediate release, he examines available witnesses. This examination is private. If the magistrate is then in doubt whether there is sufficient ground for committing the accused for trial he may commit him for further examination, so as to allow a more extensive inquiry to be made. In practice never more than eight days elapse between commitment

[43]The caption and signatures are omitted.

for further examination and commitment for trial. During this period the procurator-fiscal makes a complete investigation of the charge. He secures the precognitions of the witnesses and collects all articles and documents that may be used in evidence. When the accused is again brought before the magistrate, the latter considers the precognitions and if in his opinion these make out a *prima facie* case against the prisoner, he commits him for trial.

Bail.

The subject of bail is regulated entirely by statute. All crimes except murder and treason are bailable by a magistrate, and in these exceptional cases bail may be allowed by the High Court of Justiciary or the Lord Advocate. After the accused is brought before a magistrate for examination on declaration he may apply for bail, which the magistrate in his discretion may grant, or may refuse till the accused is committed for trial.[44] Bail is sometimes refused for the period between examination on declaration and commitment for trial for the purpose of preventing the accused from destroying incriminating evidence. During this period the procurator-fiscal is conducting his investigation into the circumstances of the crime. After the accused has been committed for trial and the opportunity has been given the public prosecutor to be heard, the magistrate may grant or refuse bail.[45] Where the magistrate refuses bail or where the applicant is dissatisfied with the amount, he may appeal to the High Court of Justiciary. The prosecutor may also appeal if dissatisfied with the granting of bail or the amount thereof.[46] According to an early statute bail was granted as matter of right in all non-capital cases, and the amount of bail was prescribed.

Prevention of Undue Delay in Prosecutions.

The Scottish law provides for no writ of habeas corpus. In lieu of this it is provided by statute[47] that where a prisoner has remained in prison for sixty days on a commitment for trial and no indictment has been served upon him, he may by notice to the Lord Advocate compel that official either to

[44]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 18.
[45]Bail (Scotland) Act, 1888 (51 and 52 Vict. c. 36), s. 2.
[46]Bail (Scotland) Act, 1888 (51 and 52 Vict. c. 36), s. 5.
[47]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 43.

serve him with an indictment within fourteen days or to show cause before the High Court of Justiciary why the indictment was not served. If sufficient cause is not shown, the prisoner is released, but the Lord Advocate may subsequently raise an indictment against him and cause him to be arrested and recommitted. Where a prisoner on whom an indictment has been served is detained in custody for more than 80 days, then unless his trial is finally concluded within 110 days from the date of his commitment for trial, or unless such delay was due to some sufficient cause for which the prosecutor was not responsible, the prisoner is set at liberty and declared free of the charge.

Bringing of Indictment.

After the procurator-fiscal has obtained the precognitions of the witnesses, he reports these with his opinion of the case to the Crown agent, who submits them along with a record of the previous convictions of the accused to Crown counsel—in ordinary cases to an advocate depute, in serious cases to the solicitor-general or the Lord Advocate. Crown counsel, who often consults with the officials of the Crown office, decides whether an indictment shall be brought, and if so, in what court the accused shall be tried. The latter decision depends upon the seriousness of the offense, and the number and character of the previous convictions. If the punishment that may be imposed is greater than two years' imprisonment the trial must be before the High Court. In such a case Crown counsel drafts the indictment and prosecutes when it comes to trial. If Crown counsel directs that the trial shall be before the sheriff court the indictment is drafted by the procurator-fiscal who prosecutes.

Comments on Preliminary Investigation.

The proceedings up to this point present two of the most characteristic features of the Scottish procedure, viz., (1) the private character of the preliminary investigation and (2) the bringing of the indictment by the Lord Advocate at his discretion. The success of both of these depends upon the ability and integrity of the prosecuting officials. Where there is the tradition of honest administration, where the officials are paid adequate salaries, where the term of service

is long, and the chances of promotion good, and particularly where there is a responsible head, the results are likely to be satisfactory, and such seems to be the case in Scotland. In discussing the Criminal Procedure Bill of 1887 Lord Advocate Macdonald said in the House of Commons:

"In carrying out any procedure whatever you cannot avoid the necessity of depending to a certain extent upon the discretion of your officials, and all you can do in cases where the discretion is abused and mistakes of a serious kind are made, is to bring public opinion and the opinion of this house to bear upon them."[48]

All the prosecutors in the High Court and the sheriff court are appointed by the Lord Advocate, and are under his control. He is responsible for their official acts and may be called to account for them at any time on the floor of the House of Commons.

One of the purposes of the private examination is to prevent the facts and circumstances of the charge from becoming publicly known before the trial, so that the persons selected as jurors may be free from preconceived opinions and bias. To a great extent this result is secured. The officials, of course, do not disclose the evidence, and in comparison with the practice in this country, little newspaper investigation and discussion of the case prior to the trial. The Scottish newspapers have not, however, an absolutely clean record.[48½]

[48] 316 Hansard 1377.

[48½] In the famous Monson case in 1893, Mr. Comrie Thompson for the defense warned the jury not to be prejudiced by the statements of the newspapers prior to the trial. He said:

"But all these elements of anxiety are as nothing compared with that which I now mention to you, namely, the fact that I see the greatest difficulty, acting as conscientiously as you may, in your disabusing your minds of the prejudice which has been excited against this man at the bar during the last three or four months. I impute no motives to the newspapers. I am sure they were not actuated by any base feeling of animosity, but I cannot help saying that they have, in many instances and with great persistency, attempted to gratify the curiosity of the public at the expense of the man who was suspected of the crime. No one in this country has been able, during the period I have mentioned, to lift a newspaper in which he did not find himself face to face with paragraphs headed The Ardlamont Mystery or The Monson Case; and in every instance the statements contained in these paragraphs were highly prejudicial to the prisoner."

In July, 1912, a murder was committed in a park near Dunfermline and a young man named Anderson was charged with the offense. The witnesses to the tragedy were interviewed by newspaper reporters and their statements published. An Edinburgh paper in reporting the case started two paragraphs with the following: "Anderson's landlady, in a conversation with a *Dundee Advertiser* reporter, said....."

"John Anderson, one of the park staff, gave a graphic account of the movement of Anderson to a *Dundee Courier* reporter."

Indictment.

All prosecutions before the High Court and the sheriff court are by indictment in the name of the Lord Advocate. One of the most important improvements brought about by the Act of 1887 is the simplification of indictments. Before that act the indictment was a most complex and technical document. The charging part was in syllogistic form with a major proposition, that by law a certain act was punishable as a crime, and a minor proposition, that the accused committed that act, whereby he was guilty of such crime. The circumstances of the offense had to be stated with great precision. The indictment in a notorious case in 1878 was as follows:

"EUGENE MARIE CHANTRELLE, now or lately prisoner in the prison of Edinburgh, you are indicted and accused at the instance of the Right Honourable William Watson, Her Majesty's Advocate for Her Majesty's interest: That albeit, by the laws of this and every well-governed realm, murder is a crime of an heinous nature, and severely punishable; yet true it is and of verity that you, the said Eugene Marie Chantrelle, are guilty of the said crime, actor, or art and part: In so far, as on the 1st or 2nd day of January, 1878, or on one or other of the days of December immediately preceding, within the dwelling-house in or near George street, Edinburgh, then occupied by you, the said Eugene Marie Chantrelle, you did wickedly and feloniously administer to, or cause to be taken by, Elizabeth Cullen Dyer or Chantrelle, your wife, now deceased, then residing with you, in an orange, or part or parts thereof, and in lemonade, or in one or other of these articles, or in some other article of food or drink to the prosecutor unknown, or in some other manner to the prosecutor unknown, a quantity or quantities of opium or other poison to the prosecutor unknown; and the said Elizabeth Cullen Dyer or Chantrelle, having taken the said opium or other poison by you administered or caused to be taken aforesaid, did, in consequence thereof, die on the said 2nd day of January, 1878, and was thus murdered by you, the said Eugene Marie Chantrelle." * * * "All which, or part thereof, being found proven by the verdict of an assize, or admitted by the judicial confession of you the said Eugene Marie Chantrelle, before the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, you the said Eugene Marie Chantrelle ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

(Signed) JAS. MUIRHEAD, A. D."

In contrast with this are the indictments in two recent murder cases;

"James Henry Hollingsworth, prisoner in the prison of Greenock, you are Indicted at the instance of the Right Honourable ALEXANDER URE, His Majesty's Advocate, and the charge against you is that, on 8th March, 1912, within the dwelling-house at 4 Watt street, Greenock, then occupied by Jamesina Hollingsworth, your wife, you did assault Malcolm Hollingsworth, your son, then residing at 4 Watt street aforesaid, and now deceased, cut his throat with a razor; and did murder him."

DAVID ANDERSON, A. D.

"Peter Donald, at present an inmate of the Royal Asylum, Aberdeen, you are Indicted at the instance of the Right Honourable ALEXANDER URE, His Majesty's Advocate, and the charge against you is that on 30th April, 1912, in the bathroom of your house, No. 65 Duthie Terrace, Aberdeen, you did drown Phyllis Donald, aged 13 months, your infant daughter, by placing her in water in the bath of said bathroom, and did murder her."

DAVID ANDERSON, A. D.

In a schedule attached to the Act of 1887 examples of indictments are given. They are all notable for their simplicity and conciseness. Following are several examples:

"You did break into the house occupied by Andrew Howe, banker's clerk, and did there steal twelve spoons, a ladle, and a candlestick."

"You did place your hand in one of the pockets of Thomas Kerr, commercial traveller, 115 Main street, Perth, and did thus attempt to steal."

"You did, while in the employment of James Pentland, accountant, in Frederick street, Edinburgh, embezzle forty pounds fifteen shillings of money."

"You did pretend to Norah Omond, residing there, that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you one pound one shilling of money as a subscription thereto, which you appropriated to your own use."

"You did administer poison to Vincent Wontner, your son, and did murder him."

"You did ravish Harriet Cowan, millworker, of 27 Tweed Row, Peebles."

It is permitted to charge in an indictment by way of aggravation the previous conviction or convictions, in any part of the United Kingdom, of a similar or cognate offense. Thus in charging a crime inferring dishonesty, there may be added a charge that the accused was previously convicted of another form of dishonesty; and in charging a crime of violence any previous conviction of a violent crime may be charged.[49] For instance:

"Michael Monaghan, prisoner in the prison of Glasgow, you are Indicted at the instance of the Right Honourable ALEXANDER URE, His Majesty's Advocate, and the charge against you is that, on 26th May, 1912, in Charlotte Lane, Glasgow, you did assault John Fraser Forbes, residing at 16 Watson street, Glasgow; and did seize him by the throat, hold him against a wall, place your hand in one of his pockets, and did thus attempt to rob him; and you have been previously convicted of assault, of dishonest appropriation of property, and of attempt to appropriate property dishonestly.

GEO. MORTON, A. D"

Notwithstanding the simplicity of the indictment liberal power of amendment is given to the trial judge. A section of the act of 1908 provides that:

"It shall be competent at any time prior to the determination of the case, unless the court see just cause to the contrary, to amend the complaint or indictment by deletion, alteration, or addition, so as to cure any error or defect therein, or to meet any objections thereto, or to cure any discrepancy or variance between the complaint or indictment and the evidence. Provided that such amendment shall not change the character of the offense charged, and provided further that, if the court shall be of opinion that the accused may by such amendment be in any way prejudiced in his defense on the merits of the case, the court shall grant such remedy to the accused by adjournment or otherwise as to the court may seem just."[50]

Thus the ends of justice cannot be defeated by a defect in the indictment, or a variance between the indictment and proof, and at the same time the accused is protected from surprise or prejudice.

[49]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), secs. 63 and 64.

[50]Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), s. 30.

Service of the Indictment.

For many years it has been required that a copy of the indictment with a complete list of the witnesses and the productions be served on the accused. This is greatly to his advantage, as it enables him to prepare an intelligent defense, and to investigate the character of the witnesses against him. The prosecutor at the trial is not permitted to call any witnesses against the accused of whom he has not received notice. Until recently the accused was also served with a copy of the jury list. This practice was abolished by the Act of 1887, which, however, provides that a copy shall be furnished the accused on application.[51]

Pleading to Indictment.

When an accused person is served with an indictment he is also notified to make two appearances, the first for the purpose of pleading to the indictment and the second for trial. These appearances are called "diets." The first diet is always before a sheriff—the nearest sheriff to the prison, if the accused is confined; the sheriff of his domicile, if the accused has been liberated on bail. The second diet is before the court which has jurisdiction to try the offense—either the High Court or the sheriff court, as determined by Crown counsel. The first diet must be not less than six days after the service of the indictment and the second not less than nine days after the first diet. Following is the form used when the first diet is in the sheriff court, and the second diet in the High Court:

A. B., take notice that you will have to compear before the sheriff of.....within the Sheriff Court House at..... upon the.....day of.....188.... at.....o'clock for the first diet, and also before the High Court of Justiciary within the.....Court House at.....on the.....day of.....188.... at.....o'clock for the second diet, to answer to the indictment against you to which this notice is attached.

Served on the.....day of.....188.... by me.

JAMES BAIRD,
Chief Warden of the Prison of Edinburgh.

JAMES HALDANE, witness.

[51]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 38.

Preliminary objections by way of abatement, for instance, that the court has not jurisdiction, that there was a defect in the service, or that the indictment is defective, must be presented at the first diet.

The last of these objections was formerly very frequent, but since the act of 1887, which simplified indictments, such objection is seldom made, except when it is claimed that the indictment fails to state a criminal charge. In case the indictment is shown to be defective the sheriff has extensive power to amend the indictment, provided that this will cure the defect. If not, the diet is adjourned, and a new indictment is served. All pleas in bar of trial, such as that the accused has already "tholed an assize" (double jeopardy) or is insane at the time, must be presented at the first diet. Special defenses such as alibi, insanity and self-defense, must be pleaded at the first diet, unless cause can be shown to the satisfaction of the trial court for the defense not having been lodged till a later date, which must in any case not be less than two clear days before the second diet.[52] The procedure at the first diet is practically the same, whether the second diet is to be before the sheriff court or the High Court. In the latter case the proceedings at the first diet may be reviewed by the High Court at the second diet. The sheriff may also reserve objections for the consideration of the High Court. If the accused pleads guilty to the charge where the second diet is set for the sheriff court, the sheriff sitting at the first diet may at once sentence. If the second diet was set for the High Court, the accused who has pleaded guilty is remitted to that court for sentence.

It is possible for a person who has been committed for trial to hasten the procedure if he intends to plead guilty to the charge. He may give through his law agent written notice of his intention to the Crown agent, in which event an indictment will be served at once, citing the accused to appear at a diet not less than four days after the date of service.[53] If the plea is accepted by the procurator-fiscal, the sheriff will either impose sentence, or remit the accused to the High Court for sentence, according to the degree of punishment that may be imposed.

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[52]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 36.
[53]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 31.

The system of two diets results in a great saving of time at the trial. Of course, if the accused pleads gulity at the first diet, there is no trial. If he pleads not guilty, all questions preliminary to the trial of the facts have been settled, and the issues are determined. As a result the jurors need be in attendance for a much shorter time than is necessary when all questions relative to service, jurisdiction and the sufficiency of the indictment must be determined at the trial.

The accused is required to provide the prosecutor with a list of his witnesses and productions at least three days before his trial, and he is not allowed to examine any witnesses nor put in evidence any productions not contained in this list. If he can show before the jury is sworn that he was unable to give the full notice of three days, the court will adjourn or postpone the trial. The chief reason for requiring the accused to plead his special defenses at the first diet, and to give notice of his witnesses is the fact, that the prosecution's case must be completed before the defense calls any witnesses. It is thus necessary for the prosecution to anticipate its rebuttal.

Qualifications of Jurors.

In criminal trials the jury is composed of five special jurors and ten common jurors. The difference between the two classes of jurors is based upon the amount of property owned. The qualifications for each class are prescribed by statute. Every man, except those expressly exempted, between the ages of twenty-one and sixty years, is eligible to serve as a common juror who is seised in his own right or in the right of his wife of an inheritable estate within the county or town from which the jury is to come, of the yearly value of $25 at least, or is worth in personal property the sum of $1000 at least.[54] A special juror must either pay a land-tax in the county or town from which the jury is to be taken upon $500 of valued rent or pay assessed taxes to the Crown on a house of the yearly rent of $150, or own lands in Scotland of 100 pounds rent per annum, or possess personal property to the amount of 1,000 pounds.[55] A list of the persons qualified to serve as jurors is kept by the Sheriff-Clerk of the county. No exact number of jurors need be

[54]Jurors (Scotland) Act, 1825 (6 Geo. IV. c. 22), s. 1.
[55]Jury Trials (Scotland) Act, 1815 (55 Geo. III. c. 42), s. 24.

summoned for a particular sitting of a court. It is sufficient to summon "such jurors only commencing from the top of the lists of special and common jurors respectively, as may be necessary to ensure a sufficient number" for the trial. Jurors in criminal cases are not paid for their services or reimbursed for their expenses. This works considerable hardship in some cases, particularly if the jurors must come from any of the outlying islands such as the Orkneys or the Shetlands. One of the judges of the High Court was asked why the jurors are not paid, at least an amount equal to their necessary expenses. He replied that jury service is regarded as a high civic duty which payment would tend to lessen. After very long and difficult cases the jurors are generally excused, by the judge, from jury service for a term of years.

TRIAL (SECOND DIET).[56]

Preliminary Matters.

The trial of the accused is either in the sheriff court or the High Court of Justiciary, depending upon the seriousness of the charge. The procedure in each court is practically the same.

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[56]Following is a schedule of the proceedings prior to the trial, compiled by Messrs. Renton and Brown in their book on criminal procedure:

Monday, June 7—Petition and warrant to arrest issued.

Tuesday, June 8—Declaration (if desired by accused) and committal for further examination.

Wednesday, June 16—Committal for trial. (Should as a general rule be within eight days from declaration.)

Monday, June 21—Case reported to Crown Office. (No fixed period for this, but should be as early as possible after committal for trial.)

Monday, June 28—Indictment drafted by Crown Counsel.

Friday, July 2—Proof print sent to procurator-fiscal for revisal.

Monday, July 5—Proof print returned revised.

Friday, July 9—Warrant of citation issued by Clerk of Justiciary.

Monday, July 12—Indictment served. List of jury (not less than thirty) prepared under directions of Clerk of Justiciary. Indictment and documentary productions lodged with Sheriff Clerk of court of first diet.

Monday, July 19—First diet (six clear days after service). Any objections to relevancy, etc., to be stated and minute signed by Clerk stating that such objections sustained or repelled. Any special defense tendered and recorded, Plea of not guilty recorded and signed by Sheriff.

Friday, July 23—Last day (five clear days before trial) for notice to Crown Agent of challenge of previous convictions.

Saturday, July 24—Last day (four clear days before trial) for notice to Crown Agent of inability to find any person or witness mentioned in indictment. Last day (three clear days before trial, allowing for Sunday intervening) for notice to Crown Agent of witnesses and productions for defense. Copies of all written notices to be lodged with Clerk of Justiciary for use of court.

Thursday, July 29—Second diet. Trial.

In the High Court, if the accused fails to appear for trial, the prosecutor being present, sentence of fugitation or outlawry is passed against the accused. The effect of this sentence is thus stated by Hume: "He cannot bear testimony on any occasion or hold any place of trust, or even pursue or defend in any process, civil or criminal, or claim any personal privilege or benefit whatsoever of the law."[57] His personal property also escheats to the Crown. In the Monson case (1893) one of the accused persons, Scott, who failed to appear for trial, was outlawed.

When a case is called for trial in either court the accused may present, for the purpose of securing an adjournment, objections in respect of the misnomer or misdescription of any person named in the indictment or of any witness in the list of witnesses, provided he has given notice, four days before the trial, to the prosecutor of his inability to discover who such person named in the indictment is, or to find such witness, and has not been furnished by the prosecutor with such additional information as might enable him to ascertain who such person is, or to find such witness in sufficient time to precognosce him before the trial.[58] If either of these facts is shown the court will probably order an adjournment.

The High Court, when the trial is before that court, may review the proceedings at the first or pleading diet, and if it is shown that the accused pleaded guilty to an incompetent charge, or under circumstances which tended to prejudice him, the court may allow the plea to be withdrawn or modified and will grant an adjournment.[59] Sometimes the trial judge of his own initiative will point out a defect in the indictment.[60]

If the prosecutor is not prepared for trial, because a material witness is absent or for some other reason, he may at any time before the jury is sworn to move to desert the diet *pro loco et tempore*. The granting of this motion is in the discretion of the court. If granted, a later date is set for the trial.

If the accused pleaded not guilty at the first diet he may change this at the trial to guilty. An entry to this effect is made in the record, and signed by the accused and the judge.

[57]Vol. II, p. 270.
[58]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 53.
[59]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 41.
[60]See Coutts, 1899, 3 Adam, 50.

Impanelling the Jury.

The jury is composed of fifteen jurors, five special and ten common. The names of those who have been summoned for jury service are placed in two glass jars, one for the special, the other for the common jurors. The clerk draws at random the names from the two jars. If a juror when called fails to answer, he is fined by the court. A person qualified as a juror seldom attempts to escape jury service. About the only excuse that is accepted is illness, and a medical certificate is required.

The prosecutor and the accused may each peremptorily challenge five jurors, not more than two of whom are special jurors. The challenge must be made when the juror is drawn. Each party has an unlimited number of challenges for cause. It is, however, very unusual for the prosecutor to challenge a juror. There is no *voir dire* examination. If the challenge is based upon the lack of sufficient qualification, this can be proved only by the oath of the juror objected to. Challenges of both kinds are very rare. The writer observed a challenge in but one case, when two jurors were peremptorily challenged by the defense. The juries in all cases seemed to be composed of intelligent men, impressed with the seriousness of their position.

After the jury is selected the clerk reads to them the charge against the prisoner, omitting any reference to previous convictions. The jury is then sworn as follows: "You fifteen swear by Almighty God, and as you shall answer to God at the great Day of Judgment, that you will truth say and no truth conceal, in so far as you are to pass on this assize." This oath is a survival from the time when the jury based their verdict upon their own knowledge of the facts.[61] After the jury is sworn no adjournment can be granted. The last step before the examination of witnesses is the reading to the jury of any special defenses, notice of which has been given.

Examination of Witnesses.

One of the characteristic features of Scottish procedure is the absence of an address to the jury by the prosecutor before

[61] "Assizers may in our Law judge according to their privat knowledge; without Lawful probation, which seems dangerous in Criminal cases." Mackenzie, p. 249.

evidence is introduced. The Lord Justice-Clerk (Kingsburgh) in the Monson trial spoke of this as a humane provision. The judge and jury obtain their first knowledge of the case against the accused from the testimony of the witnesses for, in addition to the above fact, there has been, as already stated, no preliminary public examination for the newspapers to report. No witnesses are examined on oath till the trial.

The oath, which is administered to the witness by the judge, is as follows: "I swear by Almighty God, as I shall answer to God, that I will tell the truth, the whole truth and nothing but the truth." Young children are not sworn; the judge simply tells them to speak the truth. With the exception of medical witnesses, who are to give opinion evidence, all the witnesses in a case except the one under examination are compelled to leave the court.

The examination of the witnesses is based upon their precognitions. If the trial is in the sheriff court, the procurator-fiscal, who prosecutes, has previously examined the witnesses privately and obtained their precognitions (statements by the witnesses of their knowledge of the facts). In the High Court the advocate-depute has the precognitions, which are sent to him by the local procurator-fiscal. In important cases the advocate-depute generally consults with the witnesses for the Crown before the trial.

It is a general rule in Scotland that an accused person shall not be convicted on the testimony of a single witness, no matter how credible. There must be also the testimony of a second witness or the testimony of the one must be corroborated by other facts or circumstances. Hume gives this example: "If one man swear that he saw the pannel stab the deceased, and others confirm his testimony with circumstances, such as the pannel's sudden flight from the spot, the blood on his clothes, the bloody instrument found in his possession, his confession on being taken or the like; certainly these are as good, nay better even than a second testimony to the act of stabbing."[62] In cases of circumstantial evidence it is not necessary that each point in the prosecution's case be proved by two witnesses. It is sufficient if a complete chain of evidence is established. All the evidence

[62]Vol. II, p. 384.

for the prosecution must be introduced before the defense calls its witnesses. After a witness for the prosecution has been cross-examined by the defense, he may then be re-examined by the prosecutor.

The prosecutor in examining witnesses is closely supervised by the court. If an improper question is asked, the court without objection made by the other side, may order the question withdrawn. Sometimes, counsel will agree in advance that certain questions, which might otherwise be objected to, shall be asked. In one case, observed by the writer, where the accused was charged with ten different acts of fire-raising, the advocate-depute before the trial said to counsel for the defense that if there was no objection he would ask his witnesses leading questions as to the facts of the burning. Counsel for the defense said he did not object, as he did not deny that the fires had occurred. As a result of this agreement the advocate-depute examined each of the persons whose property had been destroyed somewhat as follows: "Your name is John Baird, and you are a farmer in . . . . . parish. On the night of March 31st you retired about nine o'clock and an hour later were awakened by a cry of fire. You saw your barn was afire and you made efforts to extinguish the blaze, but were unsuccessful and the barn with the contents was totally destroyed, the loss being 100 pounds, covered by insurance." To this the witness replied, "yes." Ten witnesses were in this way examined as to the facts of each fire in about an hour. When it came to the question as to whether the fires had been started by the accused the advocate-depute asked direct questions of his witnesses.

As already stated, the prosecuting counsel is not permitted to examine any witness, not included in the list furnished to the accused. In a case in 1883 the sheriff before whom the case was being tried, after the close of the evidence on both sides, called and examined a witness not on the list. On appeal this was held improper.[63]

When a witness for the prosecution is being examined, it is not competent to ask him what he said in his precognition, nor can this be brought out on cross-examination, since the witness was not under oath when precognosced. Each side is entitled to precognosce the other's witnesses before the

[63]Wynn, 1883, 5 Coup. 370.

trial. This is possible because each is furnished with a list of the witnesses on the other side.

When the last witness for the prosecution has been examined, the declaration of the accused made before the examining magistrate may be introduced by the prosecutor. This is evidence against the accused but not in his favor. He can not have it read if the prosecutor objects. The declaration in most cases is unimportant as evidence, since the accused under the present practice generally does not make a declaration, unless it can be favorable to himself.

After the evidence for the prosecution is closed, counsel for the defense, without addressing the jury, calls his witnesses. In accordance with the Criminal Evidence Act of 1898, which applies both to England and Scotland, the accused person may take the stand in his own defense. There was much opposition in Scotland to the passage of this act in so far as it applied to that country. It was contended that the proposal was contrary to the principle that the prosecution must prove its case beyond a reasonable doubt, and that it would work hardship to the accused, particularly if innocent, since he would be subject to cross-examination if he testified, and the jury would as a practical matter draw a presumption of guilt if he failed to testify. In practice an accused person seldom takes the stand, and neither the judge nor the prosecutor may comment on this. If the accused does take the stand and presents a defense, which he has not disclosed in his declaration to the examining magistrate, this fact may be commented upon by the judge for the purpose of affecting his credibility as a witness.

During the examination of the witnesses the judge takes full notes of their testimony. Several of the judges, by using shorthand, take down the evidence verbatim. These notes are used by the judge in summing up the evidence to the jury. The judge takes a very active part in the examination of witnesses. He not only controls counsel in their examinations, but also puts questions to the witnesses, and sometimes explains to the jury the answer of a witness. At times the judge will stop the examination of a witness by counsel and will conduct it himself. He is more likely to do this if the witness is a child. The judge always requires that counsel shall ask nothing but relevant and important questions, often

demanding that counsel explain what he expects to bring out by a particular line of questioning. In several cases observed by the writer the judge asked the prosecuting counsel what he expected to prove by a certain witness, and on being told, called the opposing counsel to his desk and asked him if he intended to deny the truth of this. If counsel said no, the judge then said that there was no need to examine the witness further on this point, as he would instruct the jury that the matter was proved. In one case where the counsel for the Crown was examining a witness as to a certain matter, the judge told him not to proceed, unless he could prove by further witnesses a certain other matter, which was essential in order to make the first point of probative value. After a witness has been examined he cannot be recalled by either side without the permission of the judge, but not infrequently the judge will have a witness recalled in order that he may examine him further. The trial of a criminal case in Scotland is not a contest between opposing counsel, with the judge as referee, but an investigation, conducted in a simple and direct manner, into the truth of the facts material to the case. All the officials are very serious, and there is no levity such as is rather frequent in an English trial.

The jurors may take notes of the evidence and may ask questions of the witnesses. They are, however, generally instructed by the judge to postpone their questions till counsel completed his examination. In the Monson case the Lord Justice-Clerk instructed the jury not to discuss the evidence with each other until the end of the case.

If, at any time during the examination of the witnesses, the prosecutor sees that the charge against the accused cannot be established, he may, with the permission of the judge, withdraw the charge. In such a case the jury returns a formal verdict of not guilty.

At the close of the evidence for the defense both counsel may address the jury. Counsel for the defense has the last speech. This privilege, along with the absence of a preliminary address to the jury by the prosecutor, is very advantageous to the accused.

The Judge's Charge to the Jury.

After both counsel have addressed the jury the judge charges the jury, both summing up the evidence and declaring the law applicable to the case. The function of the judge in charging the jury is well stated by the Lord Justice-Clerk in the Monson case:

"The purpose of such a charge as this is twofold. It is, in the first place, that the case may be, as it were, summed up to you from a legal point of view, so that you may understand the aspects of it, and how you ought to look at it; and, in the second place, that those features of it may be brought before you which are worthy of your consideration in a more unbiased and collected form than they can be in two controversial speeches addressed to the jury from the one side and the other. For, of course, it being the duty of a public prosecutor to state all that he can against the prisoner, he does so with the utmost of his ability. On the other hand, the counsel for the defense states his case with the utmost of his ability in the opposite direction; and it is not an unreasonable thing that at the conclusion of the case some words should be addressed to the jury from a more judicial and impartial point of view. I may tell you further that it is the practice of a judge to suggest to the jury things which occur to his own mind upon the evidence, and I shall certainly do so in the course of my observations; but I do it with this remark to you, that what I have to say as matter of observation is said not to dictate to you, but solely for your personal consideration. * * * One other thing the judge has to do, and that is to guide you in the matter of law, to guide you as to how the case must be looked at with respect to the way in which it has been presented by the Crown; and, of course, the law you will accept from me as solely responsible in that department."[64]

The judge in his charge generally resolves the case into the different questions involved and then lines up on both sides the evidence relative to each question.

The judge may express his opinion of a witness' credibility. In one case where the accused testified, the judge said to the jury that it was for them to decide whether they believed this testimony but that he would not be fair to them if he did not

[64] J. W. More, The Trial of A. J. Monson, p. 438.

say that he himself was doubtful. In the same case, where there was a conflict between the testimony of the accused and that of one of the prosecution's witnesses, the judge said it was for the jury to decide which one told the truth, but for himself he thought the witness for the prosecution was an excellent witness.

When an indictment is so drawn as to charge alternate offenses the judge may instruct the jury that the evidence will not justify conviction of one charge, and that their attention should be directed entirely to the other.

Verdict.

When the judge has charged the jury, they elect a chancellor, corresponding to our foreman. The jury may return their verdict at once, or if they wish, they may retire for deliberation.

There are three forms of verdicts—*guilty, not guilty* and *not proven.* Originally there were but two verdicts in Scotland, the forms being *fylit, culpable* or *convict,* and *clean* or *free.* These were the equivalent of guilty and not guilty. Towards the end of the 17th century a practice arose whereby the jury was confined simply to finding whether certain facts presented to them by the court were proved, the court determining the final question of guilt. The jury then returned a special vedict or found that the facts as presented to them by the court were proved or not proved. In this way the verdict of not proven arose, and continued the only form of acquittal till 1728 when the jury asserted their ancient privilege of bringing in a general verdict of not guilty. The verdict of not proven, however, continued in use. The effect of this verdict and its relation to not guilty will be discussed later.

A verdict may be reached by a majority vote. Each juror registers his personal view based upon the evidence, and there is seldom any effort by one juror to influence another. When a verdict of guilty is returned the chancellor states whether it is unanimous or by a majority, without indicating the exact vote. In one case where a majority verdict was returned, the judge asked the chancellor how the vote stood. The reply was 9 to 6 for conviction. The judge then said he would take the small majority into consideration in determining the

sentence. This is an unusual practice. Ordinarily the judge does not know the vote, and even if it is known it does not affect the sentence. In most of the cases observed by the writer, where the accused was convicted, the verdict was unanimous. In two cases it was 9 to 6, and in several others it was 14 to 1. If the majority vote is in favor of the accused he need not stand another trial as in this country and in England, but is acquitted and discharged.

The majority verdict seems to work satisfactorily in Scotland, and no opposition to it was encountered. The Lord Justice-Clerk when Lord Advocate in speaking of the majority verdict before the House of Commons said: "My experience which has now extended over a number of years, is that in capital cases it is barely possible, and I have never known an instance, for a man to be convicted by a bare majority. If the verdict of the jury in such a case should be eight to seven, I am perfectly satisfied that the sentence would not be carried into effect."[65] Dr. Cameron of Glasgow said on the same occasion: "We have in Scotland no necessity for unanimous verdicts. The existing Scottish system has worked so long and so well, that I cannot see what practical purpose is to be attained by changing it."[66]

In discussing the majority verdict with the Lord Justice-Clerk the writer suggested that the chief argument in this country against less than a unanimous verdict is the requirement whereby the prosecution must prove its case beyond a reasonable doubt, the vote of several jurors against conviction amounting to such doubt. The reply to this was that there is the same element of doubt in a case where it requires many hours for the jury to reach an agreement.

The majority verdict, of course, results in expedition. The deliberations of the jury are short, and no second trial can be required. Nor can there be a miscarriage of justice because of a stubborn or prejudiced juror. The majority verdict is in part responsible for the fact that jurors are seldom challenged.

The verdict of *not proven* is clearly anomalous and illogical, because the legal effect of this verdict is the same as not guilty. The accused cannot be tried again because he has "tholed his

[65] 316 Hansard, 1399.
[66] 316 Hansard, 1400.

assize" (been in jeopardy). He is, however, stigmatized in the popular mind because the jury by their verdict have indicated that he is under suspicion, though his guilt cannot be established. Hume says: "Not uncommonly, the phrase *not proven* has been employed to mark a deficiency only of lawful evidence to convict the pannel; and that of *not guilty*, to convey the jury's opinion of his innocence of the charge."[67] This distinction is opposed to the principle that the guilt of the accused must be proved by the prosecution beyond a reasonable doubt, because it puts on the accused the burden of proving his innocence. In one case, observed by the writer, where the defense called no witnesses, counsel for the defense, in addressing the jury asked for a verdict of not proven. He said he could not ask for not guilty, as he had produced no witnesses to prove the innocence of the accused. In practice it would seem that not proven is often a compromise verdict. One of the High Court judges, writing in 1906, said: "The verdict would seem to be used by juries in order to relieve their consciences or preserve their self-respect, or perhaps as a convenient basis for compromise. They will not find a prisoner guilty, and they will not find not guilty; they will acquit him no doubt, but they place indelibly on record their view that in their opinion the innocence of the accused is extremely doubtful."[68]

In a case on circuit in June, 1912, the judge in charging the jury told them they might find the accused guilty or not guilty, and then added: "There remains, gentlemen, that last refuge of perplexed jurors, a verdict of not proven, against which I have a very strong opinion." It is needless to state that the jury did not return this verdict. Another of the High Court judges stated to the writer that he was strongly opposed to the not proven verdict. He said that a jury should be told a verdict of not guilty does not involve their personal belief in the innocence of the accused, but simply that the prosecution has not proved its case. There is general dissatisfaction with this verdict, but it is frequently returned. According to the judicial statistics for 1910, not proven was returned in more cases than not guilty.

Under the act of 1887 the jury may convict the accused

[67]Vol. II, p. 440.
[68]Lord Moncrieff in Blackwood's Magazine, 1906, p. 763.

of certain offenses not charged in the indictment. For instance, under an indictment for robbery, or for theft, or for breach of trust and embezzlement, or for falsehood, fraud and wilful imposition, the accused may be convicted of reset[69] (receiving stolen property), and under an indictment charging attempt, the accused may be convicted of such attempt although the evidence be sufficient to prove the completion of the crime said to have been attempted.[70]

The court has no power to interfere with or set aside the verdict of the jury, even though such verdict is contrary to the evidence.[71]

Sentence.

If a verdict of guilty is returned, the prosecutor moves for sentence. The court has no power to impose sentence without this motion, for the case still remains in the control of the prosecution, as representing the Lord Advocate. The prosecutor in moving for sentence may suggest the degree of punishment which he thinks the convicted person deserves. The judge is supplied with a list of any previous convictions and also with a list of the sentences imposed by other judges for similar offenses. The latter is for the purpose of securing uniformity of sentence. The judge may also examine witnesses as to the character of the convicted person.

When a sentence of death is imposed, the condemned person's movables are forfeited to the Crown.

Appeal.

Sheriff Court. The proceedings on indictment in the sheriff court are subject to a qualified review by the High Court. There are two methods for such review—*advocation* and *suspension.*

Advocation, which is employed by the prosecutor only, is the method of bringing before the High Court for review the judgment of the sheriff in dismissing an indictment. The proceeding is started by presenting to the High Court a bill of

[69]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 59.

[70]Sec. 61.

[71]"So that though they find *guilty* without any evidence, or *not guilty* against all evidence, nay though they find a verdict against their own knowledge both of the fact and the law; yet still, as their decision, is must and will stand unquestioned with the Court." Hume, Vol. II, p. 440.

advocation, asking that court to recall the judgment of the sheriff, and to order him to proceed with the trial on the indictment. A single judge may pass the bill, but it requires a quorum of the court to decide whether the prayer of the bill shall be granted.

Suspension, which is available to the defense only, is the method for setting aside an improper warrant, or a defective judgment by the sheriff. It is commonly used where an indictment has wrongly been held competent, and the accused has been convicted, where the sheriff admitted improper evidence, or where the verdict does not correspond with the indictment. There can be no review on the merits of the case, nor on facts proved at the trial. The proceeding is started by a bill to the High Court as in the case of advocation. When the bill is presented the judge may order the accused to be liberated on bail. On the hearing of the bill the High Court has power—

(a) "To pass the bill and suspend the sentence *simpliciter,* and to order repayment of any fine, penalty, or expenses paid in terms of it; or

(b) "To repel the reasons of suspension, refuse the bill, and recommit the suspender to prison if necessary; or

(c) "To amend the conviction and sentence, and to remit to the inferior judge, when necessary, with instructions."[72]

High Court. There is no appeal of any kind from the judgment or sentence of a judge of the High Court in criminal cases. As all serious offenses are triable only in this court, it results that persons receiving heavy sentences have no privilege of review. It was at one time the practice for a single judge of the High Court to refer questions of law arising in criminal cases to the full court, but this has not occurred since the passage of the act of 1887. The only relief for a wrongfully convicted person is through the Secretary for Scotland, who on behalf of the King exercises the pardoning power.

There is great difference of opinion in Scotland regarding the necessity for an appeal from the High Court. Even the judges of that court are not in agreement. One of these judges, who has been connected in different capacities with the administration of the criminal law since 1888, said he

[72]Renton and Brown, Criminal Procedure, 299.

knew of no wrong conviction in all that time. On the other hand another judge in an address delivered in 1905, said: "The first and perhaps the most serious limitation of the jurisdiction of the Justiciary Appeal Court is that it can not control or review in any way the actings of any of its members sitting as single Judges. * * * He may, with perfect impunity, disregard the views of other Justiciary Judges; he may even disregard the law that has been laid down by a full Bench, or what is more probable, may avoid the appearance of doing so by misapplying it. None of the cases I have figured are at all fanciful. I could give instances of their having occurred in my own limited criminal practice."[73] A third judge said that in his opinion no appeal is necessary, as the Secretary for Scotland takes care of all cases of injustice. A contrary view is contained in an editorial published in the Juridical Review in 1889: "Little can be said for the appeal to the clemency of the Crown, except when seeking mitigation of sentence only. It is absurd and arbitrary. To pardon a convict for the crime which he did not commit, because he did not commit it, is neither reason nor redress. A political partisan, overburdened with his proper official work, is the judge. He conducts his examination by methods exactly opposite to those regulating the normal administration of justice. No publicity, no evidence on oath, no argument, but petitions, letters, untested theories of experts, perhaps electioneering considerations, out of which somehow emerges the haphazard decision to pardon."[74] Another writer in the same magazine says: "Another, and to many minds the most serious objection to the present system lies in the fact that it is spasmodic and irregular. For one thing, it is confined for the most part, to sentences of death and of penal servitude for long terms of years. There is a danger, too, of its being confined to the two or three sensational or picturesque cases which lay hold of the popular mind, and which on that very account are least likely to require attention."[75]

A writer in the Juridical Review in 1907 makes a strong argument for allowing appeals from the High Court. He

[73]Lord Salvesen, The Justiciary Appeal Court, Its Anomalies and Limitations, 17 Juridical Review, 332, 334.

[74]1 Juridical Review, 385.

[75]A. D. Blacklock, A Court of Criminal Appeal for Scotland, 4 Juridical Review, 150, 161.

says: "Do the juries who try High Court cases possess greater intelligence and experience in weighing evidence than the juries who are impanelled in the inferior courts? Are the judges of the High Court of Justiciary, who are also the judges of the Court of Session, liable to error when sitting in civil cases, and infallible when trying criminal cases?"[76] This argument is also applicable to cases tried in the sheriff court, for as already noted, there can be no review based upon the improper charge of the sheriff to the jury, or upon the merits of the case as determined by the verdict.

The establishment of a court of criminal appeal in England in 1907 caused considerable agitation for a similar court in Scotland. This agitation has been recently strengthened by the publication of Sir Arthur Conan Doyle's book dealing with the Oscar Slater case in 1904. Slater was convicted of murder on circumstantial evidence, which by some was considered inadequate, and was sentenced to death, but this was commuted to penal servitude for life. A writer in the Scottish Law Review for October, 1912, referring to this case, condemns the lack of appeal.

Summary Procedure.

The procedure in cases before an inferior judge, where there is no jury and where the proceedings are instituted by a complaint at the instance of the local prosecutor instead of an indictment in the name of the Lord Advocate as in solemn procedure, is regulated entirely by the act of 1908,[77] which repealed a number of other acts passed at different times and covering certain phases of the subject. Under these acts the procedure was highly technical and the results correspondingly unsatisfactory. The situation before 1908 was thus described by Lord Advocate Shaw before the House of Commons: "There has arisen in the course of years in Scotland a body of legal decisions on points of legal technique, the result of which has been to put a premium upon the ingenuity of the finder of flaws, and a real obstacle in the way of administration of justice by Summary Courts with any sense of security. The instances are numerous and one of them, which is at hand, I may cite. A prisoner was convicted of two separate

[76] A. J. L. Laing in 19 Juridical Review, 390.
[77] Summary Jurisdiction (Scotland) Act (8 Edw. VII, c. 65).

offenses—a somewhat brutal assault and also a breach of the peace. He pleaded guilty to both, but because the clerk entered the conviction as of a 'crime' instead of the plural 'crimes' the court held that the conviction was bad, and the man, a criminal on two counts by his own confession, was on account of this slip sent home to his friends and his relations; a slip of grammar or the pen had let him loose upon society.''[78] The act of 1908 by providing for the amendment of the complaint and for the correction of errors in the record, and by specifying the grounds and method of appeal has prevented the miscarriage of justice through technical objections.

It is not the purpose of the writer to present all the details of summary procedure, as these can be found by referring to the statute, but certain features may well be mentioned.

Summary proceedings are instituted by a complaint and are usually conducted by the public prosecutor. The statute provides, however, for prosecution by a private party, in which case any law agent may appear and conduct the prosecution.[79] Complaints at the instance of private prosecutors for offenses where imprisonment without the option of a fine may be imposed require the concurrence of the public prosecutor.

The accused is usually brought into court by a summons, though the judge has the power to issue a warrant for arrest when he deems this expedient. Where a person has been arrested for an offense which may be tried before any court of summary jurisdiction except the sheriff court the chief constable or other officer in charge of the police station may liberate the accused person till his trial upon receiving a deposit of cash or any article of the same value. If the accused does not appear for trial the pledge is forfeited. The magistrate may then issue a warrant for his apprehension, but in the police courts this is seldom done. It is a common practice for persons in the cities charged with minor offenses not to appear when their case is called and thus to allow their bail pledge to be forfeited. They accomplish this advantage, that a conviction cannot be recorded against them. As the deposit required is generally not much in excess of the fine

[78]192 Parliamentary Debates (4th series), 101.
[79]Sec. 18.

that would be imposed upon conviction, there is a strong incentive not to appear for trial. In Glasgow, for instance, the usual deposit required in cases of drunkenness is 7s. 6d.[80]

When the case is called against the accused he may state any objections to the complaint, and no such objections can be made at a later time, except with leave of court on cause shown.[81] The court has power to amend the complaint at any time before the final determination of the case in accordance with the section of the statute noted on page 23 of this report. A large percentage of the persons charged with offenses in the courts of summary jurisdiction plead guilty.

After conviction or plea of guilty any judge of summary jurisdiction, except the sheriff, is given power to punish as follows:

(1) To award imprisonment with or without hard labour for any period not exceeding sixty days;

(2) To impose a fine not exceeding ten pounds;

(3) To ordain the accused (in lieu of or in addition to the said imprisonment or fine) to find caution for good behaviour for any period not exceeding six months and to an amount not exceeding twenty pounds;

(4) Failing payment of the said fine or on failure to find the said caution, to award imprisonment according to this scale: When the amount adjudged to be paid or for which caution is to be found does not exceed 5s, the period of imprisonment shall not exceed 5 days.

Exceeds—

5s, but does not exceed 1 pound.....Imprisonment 10 days
1 pound, but does not exceed 3 pounds
Imprisonment 20 days
3 pounds, but does not exceed 5 pounds
Imprisonment 30 days
5 pounds, but does not exceed 20 pounds
Imprisonment 60 days
20 pounds.....Imprisonment 3 months.[82]

He may also dismiss with an admonition. This is usually done in the case of first offenders. In sentencing, the magis-

[80]See testimony of Mr. Stevenson, chief constable of Glasgow, before the Royal Police Commission, 1907, p. 913.
[81]Sec. 29.
[82]Secs. 7 and 48.

trate often takes into consideration whether the guilty person has been in custody or liberated on bail.

The act of 1908 provides that where any person has been convicted and imprisoned as a result of any proceeding or judgment of a prosecutor or magistrate, which is malicious and without probable cause, and such proceeding or judgment has been quashed, the person injured thereby may bring an action for damages against the offending official.[83]

APPEAL IN SUMMARY CASES.

The method of review in summary cases provided by the act of 1908 is the stating of a case by the magistrate for the opinion of the High Court. Only questions of law can be reviewed, and either side may have a case stated.[84] The practice is for the clerk of the court, upon application made by the appellant, to prepare a draft of the case, setting forth the facts that have been proved, and the questions of law to be reviewed. A copy of this draft is then sent to each side and upon their agreement on the terms of the case, it is presented to the magistrate for his approval.[85] The stated case, along with a copy of the proceedings of the case, is then filed with the clerk of the High Court. The stated case should not contain a recital of the evidence, but should consist of a statement of the facts, which the magistrate has found to be proved. This involves the opinion of the magistrate as to the credibility of the witnesses. The stated case is unsatisfactory as a basis of appeal if insufficient or not clearly stated. The case is argued before the court, which may affirm, reverse, or amend the judgment of the inferior court.[86]

Where a case has been tried before the justices of the peace sitting at petty sessions there may be an appeal to the quarter sessions by either side on questions of law or fact. Since the act of 1908 most appeals from the justices on questions of law have been brought to the High Court by stated case.

[83]Sec. 59.

[84]Sec. 60. It is provided by section 75 that "no conviction, sentence, judgment, order of court, or other proceeding whatsoever under this Act shall be quashed for want of form, or, where the accused was represented by a law agent, shall be suspended or set aside in respect of any objections to the relevancy of the complaint, or to the want of specification therein, or to the competency or admission or rejection of evidence at the trial in the inferior court, unless such objections shall have been timeously stated at such trial by the law agent of the accused."

[85]Sec. 65.

[86]Sec. 72.

GENERAL CONCLUSION.

The test of any system of criminal procedure is whether it produces satisfactory results, and inspires public confidence. The Scottish people have a very high opinion of their system and believe that on the whole it works satisfactorily. In speaking before the House of Commons in 1887 Dr. Cameron of Glasgow said: "He was as strongly impressed as any one could be with the general superiority of the principles on which the criminal law was administered in Scotland over those in England."[87] The Lord Justice-Clerk in 1898 wrote: "But the important thing in favour of the procedure is that it gives complete satisfaction to the public mind in Scotland, and results in as large a percentage of convictions as in any other part of the kingdom, if indeed it be not larger, while there is no substantial complaint of any kind either from the watchful citizen, who is ever ready to detect the executive in error, or from persons brought to trial and their friends. After a long experience of criminal procedure in the case of serious crime in Scotland, I feel sure it may be said with truth that the public mind is at rest as regards the justice of what is done, and that those who are dealt with have no feeling that they have not been treated with a due regard to their rights to fair trial."[88] Another writer stated in 1901: "Our Scottish system of detection and prosecution is rapid and effective, giving little trouble to the individuals injured, and reasonably fair to the accused. There is no country where there are fewer unnecessary prosecutions, less hardship and vexation in the detection of crime, more guilty persons convicted, and fewer innocent persons condemned."[89]

Satisfactory results in the administration of the criminal law are not due alone to the system of procedure. General social and economic conditions must also be considered. In Scotland the problem of administration is not difficult. The country is in a well settled condition, and the number of commercial and industrial offenses, which always test a system of procedure hardest, are comparatively small. The great majority of the offenses are due to intemperance and do not involve difficult points of law. Apart from the character of

[87]316 Hansard, 1371.
[88]J. H. A. Macdonald, Prisoners as Witnesses, 10 Juridical Review, 129, 134.
[89]Chas. J. Guthrie (now Lord Guthrie) in 13 Juridical Review, 133, 144.

the cases to be dealt with and the condition of the country the success of a system of procedure depends perhaps more upon its administration than upon the form of the system itself. The character and ability of the officials and their freedom from improper influences are determining factors. Freedom from influence is often a matter of development and such has been the case in Scotland. Up to the year 1734 Scottish judges were permitted to hold seats in Parliament. A Scottish historian, writing of conditions about the middle of the eighteenth century, says: "The authority of the bench was weakened not only by political bias, but by its close connection with, and its subserviency to, the landed aristocracy. * * * Their skill and dexterity as exponents of the law were much more frequently shown in finding specious theories to defend the opinion to which they were pledged than in steering a straight course to the goal of absolute justice."[90] Today the Scottish judge occupies an independent position, free from political and social influence.

In the case of the prosecuting officials the development has been away from political and other influences. Until recently some of the procurators-fiscal did not devote all of their time to their positions, but also acted as the law agents of landed proprietors.[91] Their appointment was formerly a political one, but the present Lord Advocate recently announced in the House of Commons his intention of filling vacancies by promoting those of lower rank. The appointments of the Lord Advocate and the advocates-depute still depend in part upon party affiliation, and they go out of office upon the defeat of their party. The Lord Advocate is always a member of Parliament, and the advocates-depute may hold seats there. There is at present some agitation for the permanent appointment of the advocates-depute, and for depriving them of the right to participate in political matters.

The only points of procedure to which there seems to be any opposition are the verdict of "not proven" and the lack of an appeal from the High Court.

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[90]Sir Henry Craik, A Century of Scottish History, 245.

[91]Dr. Cameron of Glasgow before the House of Commons in 1887, 316 Hansard, 1372.

The question now arises whether the Scottish system as a whole can be recommended for adoption in this country. To this the answer is no. This system developed to fit the local conditions,[92] and must be considered along with the manner of its administration. One of the members of the German commission that investigated the criminal procedure of England and Scotland in 1907 said in his report: "Certainly we should not copy Great Britain, for very few of its institutions are directly transferable."[93]

Is there any particular point of Scottish procedure that could be adopted to advantage in this country? This is a difficult question to answer, for each feature of a system is related to all the others. In most countries criminal procedure has developed by various readjustments of the balance between the provisions favorable to the prosecution and those favorable to the accused. If at a particular time the public, often influenced by the outcome of a sensational case, comes to feel that either side has too great an advantage, a change is made in the procedure to offset this advantage by inserting a provision favorable to the other side. For instance, the granting of appeal in England was largely due to the popular feeling aroused by the notorious Beck case. Most of the changes made in the procedure in England and Scotland have been favorable to the accused.

In this country the feeling now is that the accused has too great an advantage, and various suggestions are being made to remedy this. One of these is that less than a unanimous verdict be required for conviction, a two-thirds or three-fourths verdict being advocated. Whether an intermediate position between a majority and a unanimous verdict is advantageous must be carefully considered. The selection of any fraction over a majority would seem to be largely arbitrary. Undoubtedly any reduction from the present requirement would

[92] "The truth seems to be, that there are in every case very great obstacles to the transferring of the Criminal Law of any one nation to another. Because, in any country, the frame and character of this part of its laws has always a much closer dependence on the peculiar circumstances of the people than the detail of its customs and regulations in most of the ordinary affairs of civil life. * * * The law respecting crimes has a near relation to the distinctions of rank among the people, the functions of their magistrates, their institutions and national objects, their manners and habits, their religion, their state of government and their position with respect to other powers." Hume, Commentaries, Vol. I, p. 16.

[93] Dr. W. Mannhardt, "Aus dem Englischen und Schottischen Rechtsleben, 55."

lessen the number of "hung juries," and is therefore desirable, provided no injustice thereby results to the accused. On this point the experience in Scotland would seem to be of some help, for very few, if any, cases of injustice can be traced to the majority verdict. It must, however, be remembered that in Scotland throughout the various stages of procedure prior to the verdict, the accused has many advantages, in that no witnesses except those contained in the list furnished to him before the trial can be called, that counsel for the prosecution does not address the jury before introducing evidence, and that counsel for the defense has the last speech to the jury. In addition to this the prosecutor is not strongly partisan in presenting his case. In this country, however, the accused has the benefit of the *voir dire* examination, whereby he may examine the veniremen as to their feelings and prejudices, and exclude from the jury any who are unfavorably disposed toward him. In one respect a fractional verdict would result in no practical change from the present situation, since verdicts of guilty are sometimes returned where on the original vote the jurors were not unanimous for conviction. On the whole it would seem that a fractional verdict would not be unjust to the accused, and would result in the conviction of some guilty persons who would otherwise escape through disagreement. If, however, the accused is to be convicted on a fractional vote, he should be acquitted if the vote is to the same extent in his favor.

One of the most unsatisfactory features in connection with the administration of the criminal law in many states of this country is the reversal of judgments of conviction because of slight and immaterial defects in the indictment. There are two reasons for this situation. One is the archaic and highly technical form of indictment that is required in many of our states. The other is the lack of power on the part of the trial judge to allow amendment of the indictment. In both these respects a lesson can be learned from Scotland. There the indictment is simple and direct and no words of art are required. In addition to this it is provided that objections to the indictment must be made before the trial of the facts, and the judges have liberal power of amendment. A statute such as that noted on page 23 of this report would remedy the existing evil here.

The administration of the Scottish system presents a number of features that might be advantageously followed in this country. Perhaps the most important of these is the independent position of the judge, who holds office for life, is paid an adequate salary, is free from political influence and newspaper pressure, and has the power to regulate the proceedings of the trial so that the issues are determined in simple and expeditious manner. This position, as has been already stated, was reached by a gradual development. There is some tendency along the same line in this country. Proposals are being made for lengthening the terms of judges, for electing them at other times than the regular political elections, and for increasing their powers at the trial. The administration of the law in Scotland surely teaches the value of an independent judiciary.

There is need for improvement in this country with respect to the position of the prosecutor and the capability of the men who hold this office. The term of service is everywhere short, and the office is a political one. Further than this, it is generally sought as a means of preferment along other lines. In the rural counties the prosecutor is generally a young man recently admitted to the bar, who expects his official record will win him clients, when he returns to private practice. In the metropolitan counties the prosecutor is often looking towards the gubernatorial chair, or to some other political position. In Scotland the prosecution of criminals is more of a profession. This is particularly true of the procurators-fiscal, who conduct the investigation of all criminal cases, and who prosecute in the sheriff courts. They receive what is practically a life appointment, and their preferment consists in being elevated to a more important post. The advocates-depute, however, go out of office with the party in power. It is highly desirable for us to take the office of public prosecutor out of politics, to lengthen the term, and to require special training in criminal law and procedure for the position. Many prosecutions fail because of the lack of skill on the part of the prosecutor. It would also be conducive to the better administration of justice if the strong partisan attitude of the prosecutor were lessened. Miscarriages of justice sometimes result through the eagerness of the prosecutor to secure a conviction. In some states prosecutors are

compensated by fees, the size of which depends upon whether the accused is convicted or acquitted. A fixed salary is preferable.

"Third degree" examinations by the police should be abolished. These are illegal, unfair to the prisoner, and often ineffective, since the sympathies of the jurors are aroused in favor of a person who has been subjected to such an examination. A provision, such as exists in Scotland, that an admission or confession made by an accused person in answer to the interrogations of the police shall not be admitted in evidence would go far to break up the "third degree."

It is very difficult to determine the exact results of the administration of the criminal law in this country because of the lack of adequate statistics. In Scotland there is published each year a complete report covering the number of apprehensions, the offenses charged, the result in each case, including the sentence, and the length of time in each case between committal and final determination. Such a report should be published annually in each state. It is unwise to propose sweeping reforms in our procedure without fuller information, than we now possess, of the results of the present system.[94]

[94]The member of the German commission, already referred to, as a result of his study of the Scottish system makes the following recommendation in his report: "It would be well for us to consider, whether we cannot become a little freer of beaurocratic pedantry, whether we cannot confide more in the intelligence and independence of judgment of a suitably trained and elected staff of judges and prosecutors, and whether we cannot make our procedure somewhat freer and more natural." Dr. W. Mannhardt, "Aus dem Englischen und Schottischen Rechtsleben, p. 55."

Plaintiffs Suing Themselves in Equity.

As there seems to be an impression prevailing among the advisers of some trustees that in suits concerning the execution of trusts, the same persons, or some of them, may be both plaintiffs and defendants, the following paragraph in the *Solicitors' Journal* (March 6, 1920, vol. 64, p. 318) may be of interest:—

> "In the Annual Practice, under ord. 16, r.1, it is stated 'The same person cannot be both a plaintiff and a defendant in the same action, or an applicant and a respondent to the same summons.' This is treated as, what most people would consider it, a self-evident proposition—at all events, no authority is cited for it. It is, however, not uncommon to come across practitioners who suppose that the same person can be a plaintiff in one character and a defendant in another character in the same action. Possibly this notion has gained currency from the circumstance that a man can, through the medium of uses and otherwise, convey to himself property to be held in another capacity than that in which it was previously held. It might be difficult to find a case in the English reports in which any attempt was made by a litigant to assume the characters of plaintiff and defendant simultaneously. There are, however, at least two New Zealand cases in recent times in which this subject is referred to. In one case it was said: 'It is irregular, as it is unnecessary, in an equity suit as at common law, to make the same person both plaintiff and defendant:' *Goss* v. *Suckling* (1911, 30 N.Z.L.R. 543, 545). The other case is more recent, and is of some interest as relating to the Public Trustee: *Re McCarthy, Public Trustee* v. *Public Trustee* (1919, N.Z.L.R. 808). The Public Trustee was the executor of a testator who left his wife in a lunatic asylum and unprovided for. As administrator of the wife's estate, the Public Trustee commenced proceedings against himself as executor of the testator, for relief under a local statute which enables

> provision to be made for a testator's family under such circumstances. The first step after initiating these proceedings was to apply to the Court for directions as to service. The Court, however, on being so applied to, held that the Public Trustee could not as plaintiff, sue himself in another capacity. This decision is just as applicable here as in New Zealand, but it indicates the existence of what may any day prove a great inconvenience—the same person or body of persons acting as trustee or trustees for different beneficiaries whose interests are divergent."

To these cases may be added *Wavell* v. *Mitchell,* 64 L.T. 560 (1891), in which a first mortgagee brought a foreclosure action against the second, third, and fourth mortgagees, and the executors and trustees of the mortgagor, and joined himself as a defendant as one of the second mortgagees. Kekewich, J., said that he did not think that a man could be both plaintiff and defendant in an action, and ordered that the plaintiff's name be struck out as a co-defendant.

In this state, in *Belknap* v. *Gibbens,* 13 Met. 471, 473, the rule was affirmed, "that a person cannot sue himself, or be plaintiff and defendant in the same case." The incongruity of doing so in a suit by trustees regarding the trust fund is indicated in *Batchelder's Case,* 147 Mass. 465, 471, by the remark, "Of course they could not file an answer to their own bill."

There have, however, been some recent cases of suits by trustees in which they have joined themselves as co-defendants, and the irregularity has passed without notice. In some of them the plaintiff has been named as the first defendant, and the cases might properly be cited as *Doe* v. *himself.* In *Welch* v. *Blanchard,* 208 Mass. 523, each of the plaintiffs is named three times as a defendant on account of different interests in the trust fund. Another person is named three times as a defendant and two others are each named twice as defendants in respect of different interests. Thus five persons are made into thirteen defendants, and two of them are also plaintiffs.

The regular course has been pursued in other cases. In *Williams* v. *Bradley,* 3 Allen, 270, the bill was filed by two

out of four trustees against the beneficiaries, including the two other trustees, and in *Lawrence* v. *Phillips,* 186 Mass. 320, one of three trustees was the sole plaintiff, and the two others, who were beneficiaries, were joined as defendants with the other beneficiaries. In *Hooper* v. *Hooper,* 9 Cush. 122, and *Dane* v. *Walker,* 109 Mass. 179, the sole plaintiff, who was the trustee, claimed beneficially either concurrently with some of the defendants or against them all.

It is not necessary that all the trustees or executors should be co-plaintiffs, "for in equity it is sufficient that all parties interested in the subject of the suit should be before the court, either as plaintiffs or defendants; and therefore one executor may sue without his co-executor joining, if the co-executor be made a defendant" (1 Dan. Ch. P. (5th ed.) 200, (4th Am. ed.) 227; *Locke* v. *South Kensington Hotel Co.,* 11 Ch. D. 121). And "care must always be taken that no persons are joined as plaintiffs between whom there is any opposition of interests, and especially that no person be included among the plaintiffs who is also named as a defendant" (Hunter's Suit in Eq. (3rd ed.) 14). Accordingly in *Goddard* v. *May,* 109 Mass. 468, 472, where the suit was brought by two administrators with the will annexed, who claimed beneficially under the will, and the widow, who claimed adversely to them, joined as a plaintiff, the court held that "the claim of the widow is not properly represented here, as she joins in the bill as plaintiff, instead of answering to it as defendant." It should also be observed that one person cannot be more than one defendant in a suit, and that, if he has several interests involved in it, they will appear from the allegations of the bill or answer, and he should not be named as a defendant several times as if he were a different defendant in respect of each of the different interests.

The confusion in *Batchelder's Case,* 147 Mass. 465, 470-471, would have been avoided if the suit had been instituted by one of the executors and the other, who claimed an interest under the bill, had been joined as a defendant. But the two executors joined as plaintiffs, and one of them applied by separate counsel for leave to file an answer admitting his own allegations in the bill and alleging his claim. This was refused, but it was held that, as no objection was made, and the claim appeared on the face of the bill, he might be allowed

to present it by separate counsel. This has been sometimes taken to mean that trustees, filing a bill for the direction of the court in the execution of the trust and having themselves claims as beneficiaries must be represented as to their claims by different counsel from those that represent them as trustees. But in the argument of *St. Paul's Church* v. *Att.-Gen.*, 164 Mass. 188, on this being mentioned, Holmes, J., said that he did not intend anything of that kind by what he had said, and that he only meant that there was no objection to the trustee's appearing by separate counsel in that case. Neither the words of the equity rule 26, providing that counsel for the plaintiff in suits of this kind shall not act for any defendant, or the reasons of the rule (*Houghton* v. *Kendall*, 7 Allen, p. 73), prevent counsel for the plaintiff from supporting his personal rights although he is also a trustee. It should also be remembered that suits of this nature may be brought as well by any of the beneficiaries as by the trustees (*Dimmock* v. *Bixby*, 20 Pick., pp. 374-375; Lewin Trusts (5th ed.) 283, (12th ed.) 419, 422), and it was formerly a question whether it was proper for the trustees to institute the suit (*Curteis* v. *Candler*, 6 Madd. 123).

These cases have sometimes been instituted by petition, but in *Gibbins* v. *Shepard*, 125 Mass. 541, 543, the court said that "the proper practice is to proceed by bill in the regular form," and in *Batchelder's Case*, although the proceeding is entitled a petition, it is called a bill by the court, and might pass for one according to *Belknap* v. *Stone*, 1 Allen, 572.

From an Anonymous Member of the Association.

WHY SHOULD NOT THE NEW CONSOLIDATED STATUTES AND FUTURE BLUE BOOKS BE INDEXED BY REFERENCE TO CHAPTER AND SECTION, RATHER THAN TO PAGES?

It has heretofore been the practice in Massachusetts to index the laws, both the annual laws and the revisions, by the page rather than by the chapter and section. This has necessarily postponed the completion of the index until the pages have received their final numbering.

There would seem to be no compelling reason why this practice should continue. If the laws are indexed by chapter and section, not only may they be as readily, if not more readily found, but their publication will involve less delay. A chapter may receive its assignments in the index as soon as enacted or completed, without the necessary changes involved in the paging of the volume.

Indexing by chapter and section, which prevails in several states, will greatly expedite the publication of the forthcoming revision of the statutes, and the annual publication of the "blue book."

If members of the bench or bar have any suggestions to make as to this or any other matter relating to the index, they will be most cordially received and considered by the undersigned, who has been commissioned by the Joint Special Committee on the Consolidating and Arranging of the General Laws to prepare the index for the general revision now approaching completion.

WILLIAM E. DORMAN,
State House,
Room 304.

TWO RECENT CASES ON WAGE ASSIGNMENTS.

The supreme judicial court has said that there is no public policy opposed to wage assignments. They are recognized as valid by statute. (Citizens Loan Association *v.* Boston & Maine Railroad, 1907, 196 Mass. 528, 531.) Nevertheless since 1905, the legislature has paid considerable attention as to what should or should not constitute valid assignments of wages binding on the employer.[1]

At common law, an instrument purporting to assign future wages in an employment not yet entered upon by the assignor, was not binding on the assignee. (Eagen *v.* Luby, 1882, 133 Mass. 543.) The reason given was that one could not assign wages where there is no contract for service any more than he can sell wool to be grown upon the sheep or crops to be produced upon the land of another over which the seller has no control. He is purporting to transfer something not in being, a mere possibility coupled with no interest. (Mulhall *v.* Quinn, 1854, 1 Gray 105, 107.) (Taylor *v.* Barton Child Company, 1917, 228 Mass. 126, 130.)

Furthermore at common law, a creditor could not by authorizing his assignee to demand of the debtor a part, but not the whole of the amount owed, force the debtor to divide such amount into two or more fractions, to be paid in part to the original debtor, in part to his assignee. To use the ordinary phrase partial assignments are not binding on the debtor in actions of law.[2]

"It is not wholly a question of procedure, although the common law procedure is not adapted to determining the rights of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor

[1] See Acts of 1905, Ch. 308; Acts of 1906, Ch. 390; Acts of 1908, Ch. 605, Sects. 7 and 8; Acts of 1909, Ch. 514, Sects. 121-126; Acts of 1910, Ch. 563; Acts of 1911, Ch. 727, Sect. 22; Acts of 1912, Ch. 675, Sect. 6; General Acts of 1916, Ch. 208. Mutual Loan Company *v.* Martell, 1909, 200 Mass. 482 upholds the constitutionality of Acts of 1908, Ch. 605, Sects. 7 and 8 on the grounds that it may be in accordance with public welfare to restrict and restrain the assignments of wages as security for money loaned. McCallum *v.* Simplex Electrical Company, 1908, 197 Mass. 388, upholds the constitutionality of Acts of 1905, Ch. 308, which limits the life of a valid assignment of wages to two years.

[2] See Williston on Contracts, Vol. 1, Paragraph 441 and following.

cannot sue his debtor for a part of an entire debt, and if he brings such an action and recovers judgment, the judgment is a bar to an action to recover the remaining part." (James *v.* Newton, 1886, 142 Mass. 366, 371.)

The statutes heretofore referred to seem on their face to change both such conceptions. The statute provides that the assignment to be valid when given as security for goods sold or services rendered or in the case of money loaned as security for a loan of three hundred dollars or over, shall be in a prescribed standard form therein set forth, which form purports to assign and transfer "all claims and demands, not exempt by law (which I now have, and all) which within a period of ———— from the date hereof I may and shall have against my present employer, and against any person whose employ I shall hereafter enter, for all sums of money due and for all sums of money and demands which, at any time within said period may and shall become due to me, for services as ————," but which also sets forth that "three-fourths of the weekly earnings or wages which are ———— dollars, are exempt from this assignment."[3] Except as thus provided an assignment of wages made in accordance with statutory provisions is made binding on all wages earned by the assignor within the statutory period named in the assignment.[4]

Within the last two years the wage assignment statutes have twice been before the supreme judicial court. The first case was Raulins *v.* Levi, 1919, 232 Mass. 42. This was a bill in equity to restrain the defendant from enforcing an assignment given by the plaintiff as security for money to an amount greater than $300.00 loaned by the defendant to the plaintiff.[5] The assignment was dated August 14, 1916, so that under the statute it ceased to have legal effect after August 14, 1918.[6] The bill was filed December 21, 1917. It

[3] General Acts of 1916, Ch. 208, amending Acts of 1909, Ch. 514, Sect. 124.
[4] Acts of 1909, Ch. 514, Section 126.
[5] If the assignment had been given to secure a loan of less than $300, then its provisions would have been governed by Acts of 1912, Chapter 675, Section 6, which limits the life of such assignment to one year, and makes the acceptance in writing by the employer a condition precedent to its validity as against the employer.
[6] General Acts of 1916, Ch. 208, Section 1. According to the opinion in Raulins *v.* Levi, supra, this act went into effect May 12, 1916. Apparently this is a slip. As the act which was approved May 12, 1916, did not provide that it should go into effect on its passage, it was governed by the ordinary rule then prevailing, namely that statutes became effective thirty days after approval.

was heard by the Superior Court on an agreed statement of facts, the date of the hearing not being set forth in the opinion, and reported to the supreme judicial court for determination. The case was submitted on briefs, November 14, 1918, three months after the assignment ceased to have legal force. When the bill was filed the plaintiff was in the employ of a company other than the one in whose service he was when the assignment was made.

The defendant in his brief stated: "The defendant does not contend that the assignment of wages in question is valid to pass title to wages earned under the (existing) contract of employment . . . because that contract was not in existence at the time the assignment was made. Citizens Loan Association *v.* Boston & Maine Railroad, 196 Mass. 528, 531."[7]

The court enjoined the enforcement of the assignment saying (p. 44): "It is manifest that the assignment ceased to have legal force as security for a debt with the termination of the contract of service existing between the plaintiff and his employer at the time the assignment was made; and it is equally plain that thereby it was not merely suspended in its operation to revive and to attach to every new contract of service as often as made during its statutory life, . . . At the time the bill was filed the assignment had become void by the plaintiff's change of service; and since the bill was filed it has determined by limitation of time."

It is to be noted that, as the legal effect of the assignment had expired when the case reached the supreme judicial court, it was not necessary to base the reason for the decree issued by the court upon the logical consequences of the assignor's change of employment.

This dictum in Raulins *v.* Levi that even under the statutes, an assignment of wages is not binding on a future employer has now been overruled by a contradictory dictum in Gilman *v.* Raymond, 1920, 235 Mass. 264, contained in a decision handed

[7] Possibly the defendant's concession was based on the following passage contained in the opinion in Taylor *v.* Barton Child Company, 1917, 228 Mass. 126, 130: "There can be no sale of the wool of sheep, the crop of a field or the increase of herds not owned but to be bought, and there can be no assignment of wages to be earned under a contract of employment to be made in the future. Eagen *v.* Luby, 133 Mass. 543. Citizens Loan Association *v.* Boston & Maine Railroad, 196 Mass. 528, 531. See St. 1906, c. 390, Sect. 4; St. 1916, c. 208, Sect. 2."

down March 20, 1920.[8] Gilman *v.* Raymond was an action of contract to recover money earned by one Tobias in the employment of the defendant under an assignment to secure a debt for goods sold, executed in statutory form, dated January 7, 1918. Tobias did not enter the defendant's employment until March 18, 1918. In the lower court there had been a finding for the defendant, and the case was reported to the supreme judicial court, which affirmed the finding.

In the trial in the lower court, the plaintiff requested the judge in substance to rule that the assignment was binding on the wages earned during the two year period of its life, by Tobias while in defendant's employ starting from the date of the sending of the notice of assignment to the defendant, April 1, 1918. This request was denied.

The supreme judicial court in its opinion says: "We are of opinion that the plaintiff was entitled to such a ruling," citing as reason therefor the form of assignment prescribed in Acts of 1909, Ch. 514, sections 121 to 126 above referred to. "In view of this language, read in the light of the regulations provided by statute for safeguarding such assignments of wage earners, we think it was the intention of the Legislature to change the common law doctrine; and while limiting the assignments to a period of two years, to broaden their scope so as to cover wages earned from different employers during that period. In the case of Raulins *v.* Levi, 232 Mass. 42, the statutory two year period expired while the suit was pending, and the defendant's right to enforce the assignment ceased. What was there said with reference to the effect of the assignor's change of service after the instrument was made was based upon the concession of counsel for the defendant, quoted in the opinion."[9]

Nevertheless the court held that the finding for the defendant was right. The court's decision was not based on the ground that defendant had refused to accept the assignment

[8] See Banker and Tradesman, issue of July 10, 1920, page 114.

[9] It is perhaps unfortunate that the court did not rest its finding in Raulins *v.* Levi altogether on the expiration of the time period. Admissions by counsel as to questions of fact are binding on the client, but concessions as to law, when erroneous, ought not to be heeded by the court. Otherwise our judges would be administering the law not of the land, but of the lawyers. "We presume it will not be seriously contended that admissions of counsel of the law, where there happens to be an error in the admission, can make the law." Lancaster, J., in Mitchell *v.* Cotton, 1850, 3 Fla. 134, 160.

and to pay money thereon to the defendant. As this was an assignment to secure a debt for goods sold, and not for money under the amount of $300 loaned, the plaintiff, as the court said, was not affected by Acts of 1912, Ch. 675, section 6, which expressly requires that in the case of such loan, the assignee must secure the acceptance of the employer in order to make the assignment binding against him.[10] Under the express wording of the statute the assignment was valid as between the assignor and assignee the moment it was executed, and became binding on the employer just as soon as served on him. (Hall *v.* Boston Plate and Window Glass Company. 1911, 207 Mass. 328.) The decision of the court was based on the fact that the assignment in question in terms exempted from its operation "three-fourths of the weekly earnings of wages" of the assignor Tobias. As at common law, a partial assignment was not binding on the debtor in actions of law without the latter's consent, the court said it was not binding on him under the statute.

In so rendering its decision the court seems either to ignore or nullify the wage assignment statute. General Acts of 1916, Chapter 208, Section 1, amending Acts of 1909, Chapter 514, Section 121, says: "Three-fourths of the weekly earnings or wages of the assignor shall at all times be exempt from assignment, and no assignment shall be valid which does not so state on its face." Acts of 1909, Chapter 514, Section 126. says: "Except as above provided, an assignment of wages made in accordance with the provisions of this act shall bind all wages earned by the assignor within the period named in such assignment."

The effect of the court's decision is that there can be no recovery against an employer in an action of law upon a valid wage assignment. This surely cannot have been the intent of the legislature.

The purpose of an assignment is to give some measure of

[10] Under the apparent belief that the assignment was governed by Acts of 1910, Ch. 563, amending Acts of 1909, Ch. 514, Section 125, which contains a provision similar to Acts of 1912, Ch. 675, Section 6 above cited, the court in the first opinion handed down in Gilman *v.* Raymond, found for the defendant on the ground that the failure of the defendant to accept the assignment rendered it invalid against him. (See Department Reports, March 27, 1920, page 489.) This opinion was afterwards withdrawn. The present statutory provisions concerning assignments to secure loans of $300 or less are found in Acts of 1912, Ch. 675, Section 6, which is expressly left unaffected by General Acts of 1916, Ch. 208, Section 3.

security to creditors of the assignor, beyond the promise of the assignor to pay the debt. The security is gained by the laws imposing an obligation on the employer to honor the employee's order to pay his future wages or a certain proportion of them to the creditor. Under the present statutory law,[11] the employee and his family are protected in two ways: (1) if married, his wife must assent to the assignment; (2) three-fourths of his wages are exempt from the assignment. The employer also is protected from the annoyance of being trusteed by innumerable creditors of the impecunious employee.[12]

The amendment of the wage assignment act by which three-fourths of the wages were made exempt from attachment was largely fostered by the Boston Legal Aid Society.[13] "That this is a preventive law which actually prevents is demonstrated by the fact that during the past five months not a case of hardship or injustice resulting from any assignment of wages dated after June 12 has come to my attention. This law protects the wives and children of all wage earners in the state, it benefits employers, charities, and honest tradespeople, and indirectly, through these various channels, it promotes the happiness of the community."

Wage earners are entitled both to credit and to protection from unreasonable demands of creditors. The interpretation of the law in Gilman *v.* Raymond tends to destroy their right to credit at the hands of decent merchants inasmuch as it deprives creditors of an easy, inexpensive way of enforcing their security, without harassing the debtor.[14] The interpretation furthermore in no way protects wage earners from oppressive action by urgent creditors, who by bringing trustee process can secure all the wages due the debtor except a comparatively small exemption.

This exemption is ten dollars in the case for suit for necessaries; twenty dollars otherwise. It should be borne in mind that this exemption is not from each week's wages, but from

[11] Acts of 1916, Ch. 208.

[12] By Acts of 1909, Ch. 514, Sect. 125, as amended by Acts of 1910, Ch. 563, trustee process is not valid as against an assignment previously recorded in the city clerk's office, and served on the employer.

[13] See report of counsel for year 1915-1916 reprinted in *Massachusetts Law Quarterly*, February, 1917, p. 320, as of October 31, 1916.

[14] A very large credit business has grown up, in which the purchaser buys his goods in the regular cash retail stores for the regular cash price. The storekeeper is paid by the credit man who in turn is repaid plus a regular stated percentage upon the cash purchase price, on the weekly installment plan, by the purchaser who assigns his wages to the credit man for security.

the total amount due at the moment of the trustee writ being served. As many manufactories hold up one week's pay, it often happens nowadays that fifty dollars or more are due the employee at the moment of the attachment. Furthermore if no remedy is given the assignee in actions of law on his partial assignment, it would seem that in a suit at equity on such assignment, naming both employer and assignor as defendants, he may compel the employer to pay the entire amount of wages due the assignor into court, to await the court's order. (Andrews Electric, Inc., *v.* St. Alphonse Catholic Total Abstinence Society, 1919, 233 Mass. 20.) Either trustee process or this form of procedure is certainly more oppressive both to the employer and to the employee than a method which would cause the employer to pay without court action, one-fourth of the wages directly to assignee and three-fourths to employee.

The employer who is trusteed, moreover, is subject "to have his responsibilities so far varied from the terms of the original contract as to subject him to distinct demands on the part of several persons when his contract was one and entire," which is the reason given for refusing to allow partial assignments to be enforced at common law. (Andrews Electric, Inc., *v.* St. Alphonse, etc., Society, supra.) If the statute relating to trustee process may thus vary the employer's responsibilities in actions of law, why may they not be varied by the statute relating to assignments?[15]

It would seem that the legislature had intended to change, and had used apt words to effect such change in, the common law relating to assignments both by allowing wages in future employment to be assigned, and by imposing on the employer the obligation to respond to partial assignments in actions of law. Just as the supreme judicial court has finally after dicta to the contrary, recognized the statutory change relating to contracts of future employment, so it is to be hoped that in some further decision it will abide by the legislative intention in respect to partial assignments.

JAMES M. ROSENTHAL,
AUGUST 26, 1920. Pittsfield, Mass.

[15] "To one who is disposed to doubt the propriety of equitable protection of partial assignments of *choses in action*, it might well be asked: Should it be that the debtor cannot assign to a creditor what the same creditor can attach?" Williston on Contracts, Vol. 1, par. 443. Might not the same question be asked regarding legal protection of partial assignments?

The History and Purpose of the Wage Assignment Statutes with a Suggestion for an Amendment.

The laws of the Commonwealth concerning assignments of future wages since the decision of the Supreme Judicial Court in *Gilman* v. *Raymond* (127 N. E. 794), probably need further action by the legislature. It may be helpful, therefore, to examine briefly into the present situation and to state the history and purposes of the recent statutes governing the assignment of wages to be earned in the future.

There are two statutes which serve to separate assignments of future wages into two classes and which provide slightly different restrictions and regulations for each class.

The two classes are these:—first, assignments of wages given to secure small loans, that is, loans under $300; and second, assignments of wages given to secure debts for merchandise, clothes, watches, and any debt other than a small loan. There is no logical basis for this distinction. It results from the fact that this whole field, in common with that of small loans, has been much misunderstood, it has been a battle ground for years, bills on the subject have been before every legislature during the last decade, so that the statutes stand in their present form because of compromises and because different ideas have prevailed and have been enacted into law in different years. This I shall try to explain more fully later in this memorandum.

It would seem to be the inevitable result of the decision in *Gilman* v. *Raymond* that wage assignments may no longer be given to secure debts for merchandise. I think it is not putting it too strongly to say that in effect the court's decision abolishes the assignment of future wages in connection with purchases of merchandise. The laborer who would purchase a suit of clothes on the security of his future wages, and the merchandise house that would sell him the suit with that security for the debt are now placed by the court's decision in a dilemma from which there seems to be no escape. One horn of the dilemma is that by the statute no assignment is legal unless it expressly exempts three-quarters of the wages earned; the other horn is that by the court's decision if three-quarters of the wages earned are exempted then the assignment is or may be unenforceable against the em-

ployer. Accordingly the security has a serious possible "hole in it."

The statute (c. 208 of the General Acts of 1916) says, "*No assignment of future wages shall be valid . . . unless executed in writing in the standard form herein set forth. . . . Three-fourths of the weekly wages of the assignor shall at all times be exempt from assignment, and no assignment shall be valid which does not so state on its face. . . . Said standard form of assignment shall be as follows:— . . . (3) Three-fourths of the weekly earnings or wages which are.....dollars, are exempt from this assignment.*"

The Supreme Court said:—"But the assignment in question in terms exempted from its operation 'three-quarters of the weekly earnings or wages.' It was in effect an order on the employer to pay one-fourth of the weekly wages of his employee to this plaintiff. Whatever rights in equity such a partial assignment may confer on the assignee, it could not without the defendant's consent, split up the single and entire contract existing between him and his employer. . ."

It is true that a partial assignment is "valid in equity" and enforceable in equity even against other creditors in case of bankruptcy and the possibility of enforcing an assignment in the statutory form by a bill in equity is expressly left open by the court when it says, "Whatever rights in equity such a partial assignment may confer on the assignee (see *Andrews Electric, Inc.*, v. *St. Alphonse Catholic T. A. Soc.*, 233 Mass. 20)." But such a proceeding in equity must be brought in the Superior Court as the lower courts do not have equity jurisdiction and as a practical matter the simpler and more expeditious proceeding in an action at law in the lower courts was contemplated by the framers of the statute as adding to the practical value of the security as a basis for credit and is barred by this decision.

As pointed out by Mr. Rosenthal in the foregoing article, the strict rule of common law in regard to splitting a cause of action was long ago broken into by the legislature in providing for an attachment by trustee process in a suit at law. This was nothing but a legislative application of the equitable idea of a partial assignment of an existing claim. The idea of the framers of the asignment law in providing for a statutory form of assignment was that this accomplished in a more

satisfactory and effective manner for practical purposes of providing a basis for credit the same object which the statutes allowing attachment by trustee process accomplished, and an interpretation of the act in accordance with this purpose would seem to be reasonably warranted by the terms of the act.

Since the court does not feel that such an interpretation was required by the terms of the act, it is important that the legislature should make it clear that such was the intention. Even if the statutory form of assignment is to be considered as a partial assignment, rather than a whole assignment with a restriction on the amount collected, somewhat like the restrictions on the amount to be collected on a probate bond or other similar security, it should be made clear that the assignment may be enforced in the hands of the assignee *by an action at law*.

An additional reason for such legislation is that while it is clear that a partial assignment of an existing claim is valid in equity by the recent opinion of the court above referred to, that opinion does not go to the extent of saying that such an assignment of future earnings under some future employer would be enforced in equity. In view of the express statutory invitation to persons to give credit on the faith of an assignment in the statutory form as an authorized method of honest dealing, it may reasonably be assumed perhaps that the Supreme Judicial Court, if that question ever comes before it, will hold that the assignee was protected and entitled to enforce his assignment in equity but since the question has not yet come before the court, there is a possible hole in the statutory security resulting from the decision in *Gilman* v. *Raymond*.

Such a condition in our laws ought not to be permitted to remain. For the law to say to a man "Your contract is illegal unless it contains word for word the following clause" and then further to say "if your contract contains such a clause it is not or may not be enforceable" does not promote respect for our laws.

In dealing with the history, purpose, and significance of the laws governing wage assignments it is enough to confine the discussion to the two statutes which are the laws effective today.

The first of these, the law regulating assignments given to secure small loans, was passed in 1911. At that time the legislature had under consideration the whole question of small loans, there had been grave abuses, and drastic remedial action was considered necessary. The House Committee on Banks and Banking made an exhaustive study, collected a great deal of evidence, and filed an admirable report which was substantially enacted in chapter 727 of the Acts of 1911. This is the law which licensed the small loans business, created the office of supervisor of loan agencies, and which in many respects stands today as the pioneer and the model law for regulating the business of making small loans.

Small loans are either secured or unsecured. A secured loan is generally one in which the borrower gives as security either a chattel mortgage on his furniture or an assignment of his future wages. Wage assignments, therefore, were directly connected with small loans, the Committee on Banks and Banking considered them in its report, and the legislature in its attempt to clean up the whole small loans situation devoted one section of the law to prescribing the terms and conditions on which assignments might be given to secure small loans.

This section (Section 22 of chapter 727 of the Acts of 1911) provided that (1) if the assignor were married, his wife must assent, (2) ten dollars per week of the wages earned were exempt from the assignment, and (3) the assignment must be accepted by the employer. To these three requirements there was the next year (Section 6 of chapter 675 of the Acts of 1912) added the fourth requirement that the assignment should be made according to the standard form laid down by chapter 390 of the Acts of 1906 as amended.

This law has remained unaltered on the statute books and is still the law regulating assignments given to secure loans of less than three hundred dollars. Assignments of future wages had been authorized by earlier statutes, so that the significance and effect of this statute was to recognize, after a thorough and impartial investigation by the appropriate legislative committee, that wage assignments were necessary and proper transactions and that by fixing reasonable safeguards and exemptions they could be made to operate fairly

and without injustice. With the exception of the requirement of the employer's consent, this law in all its salient features has remained unchallenged and, with the same exception, has since been adopted in several other jurisdictions.

At the time of the passage of this law in 1911, no attempt was made to further regulate assignments given to secure debts for merchandise. It resulted, therefore, that assignments given to secure loans were strictly regulated; all others were permitted but were not strictly regulated. This latter class received no particular attention because, at that time, there was no need for attention.

In the years following 1911, however, an enormous credit business gradually grew up. Clothing, furniture, jewelry, phonographs, began to be sold in great volume on the installment plan and the wage assignment was taken as security. Then came the idea of the credit check, which is regarded as a merchandise and not a small-loans transaction, and the wage assignment was again used as the security. Speaking in terms of economics this whole development meant that specialists had discovered how credit could safely be given to persons in the humbler walks of life whose sole asset was their earning power. The credit check which allows any person to walk into a department store and buy goods with it is simply a method whereby the department store shifts to the house issuing the credit check the responsibility of seeing that the purchase is paid for. Every department store has its own credit department, but it has been found that to safely extend credit to the poorer persons requires the services of the expert in that special field. The credit check house performs that function. Again stating the situation in terms of economics, in order to avoid the dangerously misleading arguments of sentiment, what happened between 1911 and 1916 was the establishment of installment houses which gave to poorer people the same credit service which department stores give their charge customers, and closely analogous to the way in which the small loan agencies, under proper regulation, had extended to poorer people the same lending service which banks and trust companies afford to merchants or individuals with good collateral.

Those installment merchandise houses used the wage assign-

ment as their security. Concerning these assignments the law provided no strict safeguards. By 1916 there had grown up grave abuses in this field, just as prior to 1911 there had been abuses of assignments given to secure small loans. The abuses were possible because of the absence of legal restrictions; as the wife had no power to veto the assignment a husband might deprive his family of their moral equity in his earnings by assigning his wages for an unwisely contracted debt, and as no wages were exempted from the assignment, it resulted that a harsh creditor could collect all a man earned to the serious deprivation of his family or even of himself. There were other collateral results which need not be detailed here.

By 1916 a thoroughly bad situation existed. A determined drive, headed by the Boston Legal Aid Society, endorsed by all the organized charities of the city, and participated in by the City of Boston through its Law Department, was made and as a result the legislature passed an act regulating assignments given to secure debts for merchandise, or any debt other than a small loan under three hundred dollars. This law is to be found in chapter 208 of the General Acts of 1916, which since its passage has never been amended and which has generally been deemed to be a thoroughly satisfactory regulatory law.

This act, like the act concerning assignments given to secure small loans, required the assignment to be executed by the assignor in person, the use of the standard form fixed by law, the wife's consent, and was substantially similar in all its other provisions except the two following.

First, instead of exempting $10 per week from the operation of the assignment it exempted three-quarters of the wages earned. Second, it did not require the consent of the employer. As these are the two factors on which the decision in *Gilman* v. *Raymond* rests it is important to note why the 1916 law differed from the 1911 law in these two respects.

These two changes were the result partly of a compromise which was effected by an amendment to the original bill in the Senate which reconciled all parties in interest and insured the passage of the law and partly because of progress which had taken place between 1911 and 1916 in the ideas of the men and women who were interested in this matter as a

social problem. This latter influence is, for present purposes, of by far the greater importance because it indicates the fundamental propositions which cannot be departed from if wage assignments are to be regulated wisely.

Inasmuch as the chief abuses were attributable to the fact that the assignment passed title to all the wages earned without any exemption so that innocent members of a wage earner's family might be caused deprivation and suffering and the assignor himself might by one unwise act bind himself with legal chains to a hopeless condition of quasi-slavery, it was obvious that some exemption must be made. Instead of making the exemption a flat figure of $10 as had been done in 1911 it seemed preferable to provide a sliding scale. measured by the proportion of three-quarters, on the theory, which I think will appear reasonable to any one, that the proportionate exemption is more scientific, more flexible, and more likely to do justice. The fixed rule of $10 a week exemption meant that a person earning only $10 could assign nothing, and that a man earning $40 could have $30 a week taken away from him which would be calculated to upset his domestic financing. The exemption of three-quarters meant that any one could assign one-quarter of his future wages as security for debt but that he should not be allowed to assign three-quarters of his wages because it was almost certain that he and his family would need at least that amount for their decent support. The proportionate exemption also operates more fairly than a fixed exemption over a period of years because of the shifts in wage and price levels.

The reason for having an exemption is the familiar reason which is manifest throughout our law that at a certain point the social interest in not having a debtor pushed below the line of bare living into pauperism intervenes and becomes superior to the rights of the creditor and is recognized by law. It is on this ground that the minima of decent living are exempted from attachment or execution, that ten or twenty dollars a week are exempted from trustee process, and that even when a man is a voluntary bankrupt it is considered wiser to let the bankrupt keep the clothes on his back than oblige him to surrender them to the trustee for the benefit of creditors.

As an exemption of some sort is necessary, and as an

exemption of a proportion of the wages works better justice than an exemption of a fixed sum, it is to be hoped that the legislature will still maintain the position which it took in 1916 and amend the law to meet the condition resulting from the decision in *Gilman* v. *Raymond*. That this position is the correct one cannot be doubted at this time. Of recent years the whole problem of small loans and wage assignments has engaged the serious attention of many earnest persons who have approached the subject from various angles. A good deal has been written. Charitable agencies devoting themselves to these and similar questions have come into existence. I think it can be said that as the result of study and experience there is an unanimous opinion that the exemption in wage assignments should be a proportionate part and not a fixed sum. The Division of Remedial Loans of the Russell Safe Foundation in its model law which has been adopted in several states uses the proportionate exemption, and so also does the so-called ideal law drafted by the Legal Reform Bureau to Eliminate the Loan Shark Evil.

I suggest that it is unnecessary for the legislature to abandon the proportionate exemption and that the present difficulty can be avoided by an emphatic declaration in the statute, making perhaps somewhat clearer the point which heretofore we had thought was sufficiently clear, to the effect that the three-quarters which is made non-assignable is an *exemption* provided on grounds of public policy. I think it can be made too clear for any further doubt that all assignments of future wages are possible only because of the statutes, that they are possible, therefore, only on the terms prescribed in the statutes, and that the essence of an assignment transaction is for the assignor to assign all of his wages which by law can be assigned. It might also be advisable to go one step further and declare that as to assignments under this particular law the assignment shall not be considered a partial assignment and no defense on the ground of partial assignment (except where the assignment is genuinely partial as if a man assigned 1/8 or 1/10 of his wages) shall be open to the defendant.

The second distinction between the 1916 law and the 1911 law is that the former does not require the employer to consent to the assignment. The court holds that if the assign-

ment had been accepted by the employer then the assignment under the 1916 law, even though it be regarded as a partial assignment, would bind the employer and would therefore be enforceable. The converse proposition must likewise be true. If under the 1911 law the employer's consent was not necessary and was not obtained then an assignment under that law would be bad because the exemption of $10 per week would make the wages which could be assigned only a part of the wages, the assignment would be only a partial assignment, and would therefore be unenforceable.

Assuming this converse proposition to be so, it would mean that under the *Gilman* v. *Raymond* decision if the legislature amended the 1911 law by taking out the requirement for the employer's consent it would have to guard against the defence of "partial assignment." In my judgment, if the legislature is to restate the assignment laws again, it would do well to make the 1911 law conform to the 1916 law by leaving out the requirement of the employer's consent and so guarding it.

Our experience in these matters has increased greatly since 1911. I think it can now be said that in practice the requirement of the employer's consent has done more harm than good. This requirement was not enacted primarily to protect employers. The assignment is unquestionably something of a nuisance to paymasters, but so is trustee process. It has for some time been settled in this Commonwealth that for the general good the advantages of the system outweigh the disadvantages and there is no present disposition to depart from that general idea. The requirement of the employer's consent was made in the 1911 law on the theory that it would protect the wage earner. In practice it has turned out otherwise.

This requirement operates to nullify the whole law. The fact is that while assignments for merchandise debts under the 1916 law (which does not require the employer's consent) are used very commonly and without abuse assignments to secure small loans under the 1911 law are very rarely made because the employer's consent is required. There are those who rejoice in this result because they consider wage assignments in any form as iniquitous and believe it would be a wise exercise of paternalism to abolish them altogether. The

legislature, however, did not intend to abolish assignments; if ever it desires to do so it will so state in express language. I understand the attitude of labor, and the opinion of the best informed persons, to be that a poor man's earning power is his property, it is as important for him to be able to use that as for the rich man to use his stocks and bonds, that his wages are his own, and that he ought to be able to assign them without asking anybody's permission except that of his wife. It is easy to understand the attitude of the man who is unwilling to ask his "boss" if he can assign his wages as security for a suit of clothes. This runs counter to the instinct of most men and this instinct of independence is on the whole one that merits encouragement rather than suppression.

In any event, men generally refuse to ask the "boss," and this in turn means that they have no security to offer which, finally, means that they may not be able to borrow at all or that, as the risk is greater, a higher rate of interest must be charged.

The unwillingness of men to confer with their employer about their borrowing needs has been greatly enhanced by the attitude of many employers who have had a rule that any man who assigned his wages would be discharged. This rule has done more mischief than any other one thing, it has permitted unscrupulous lenders to take an assignment and then blackmail the wage earner by threatening to go to the employer about it. The error of this attitude, and the club which it gave to the "loan shark" who played his game by violating the law has been dramatically pointed out by a series of stories in the *Saturday Evening Post* and by a book called "The Bawler-Out." Fortunately the employer's attitude has improved in recent years as he came to a better understanding of the situation but even so the requirement of the employer's consent has remained a stumbling block.

In discussions of this subject we are likely to consider the one man who abuses the assignment and forget the ninety-nine who desire to use it for legitimate purposes. In legislation, we must remember that most people are honest, most people pay their debts. The actual enforcement of an assignment is proportionately as rare as the foreclosure of a mortgage, but the assignment is as important because of the

security it affords as is the mortgage. Under a law which does not require the employer's consent what happens in the vast majority of the cases is that the assignment is given as security, the debt is paid, the security is cancelled and that is the end of it. Where the employer's consent is required in advance or else the assignment is invalid, then no security can be given because either the employer will not consent or the employee is unwilling to ask his consent.

I believe we are gradually coming around to a saner and better-balanced view of this subject. We now have more experience to guide us. Most of the disinterested persons who have taken the pains to understand the subject in all its ramifications have changed their opinion as to requiring the employer's consent and today deem it inadvisable. Both the uniform small loans act drafted by the Russell Sage Foundation and the ideal act drafted by the Legal Reform Bureau to Eliminate the Loan Shark Evil place strict safeguards about the assignment of wages but neither draft requires the employer's consent. In the remedial legislation enacted in recent years in other states the almost invariable rule has been not to require the employer's consent.

It is my opinion that sometime the legislature will desire to amend our law by leaving out the requirement of the employer's consent so that our law may conform to the experience of other states, and to the opinion now generally held by the most competent students in this field, and so that it may become a practically workable law.

I suggest, therefore, that the only way for the legislature to revise the assignments law and at the same time to secure through the law those certain safeguards which experience demonstrates to be necessary is in the direction of changing the common law rule of partial assignments as laid down by the Supreme Court. It is not necessary to change the general rule, as that may be inadvisable. The change can be limited to assignments of wages made according to and under a definite statute. I believe the legislature can accomplish this limited change by declaring that the exemption is given on grounds of public policy, that the assignment is an assignment of all those wages which can legally be assigned, that therefore it is not to be considered as a partial assignment, and that as the assignment is not made partial merely by

the exemption no defense of partial assignment based on the exemption feature shall be allowed, and that it may be enforced in an action at law. This will protect the employer from the annoyance of more than one assignment so that the fundamental fairness of the common law rule will be retained. At the same time it will restore the assignment of wages as a legitimate, practicable, and reasonably safeguarded form of security which the poor man may use in time of need; in short, it will carry out what I apprehend was the intention of the legislature when it enacted chapter 208 of the General Acts of 1916.

REGINALD H. SMITH.

MORE ABOUT THE RELATIONS BETWEEN THE FEDERAL ESTATE TAX AND THE FEDERAL INCOME TAX.

In the May number of this magazine at page 346, the opinion of the acting Attorney-General of the United States that the federal estate tax was not a proper deduction from the income tax return of an estate in the course of settlement was printed and the reasoning and conclusions in that opinion were criticised. Among the reasons appearing in that opinion was a statement that:

> "When the estate passes into the possession of an executor, he holds in trust for the United States that portion which is required to be deducted as a transfer tax."

The natural result of the issuance of such a statement appears in a ruling of the Treasury Department, on page 18 of Bulletin Number 36-20:

> "Section 213 (a).—Gross Income Defined:
>
> Inclusions.
>
> Section 213 (a), Article 31: What included in gross income 36-20-1183 O.D. 656
>
> (Also Section 214 (a) 3, Article 134.)
>
> (Also Section 219, Article 341.)
>
> The Attorney-General having stated in his opinion (Ruling 875, page 46, bulletin 16-20), that when an es-

tate passes into the possession of an executor, he holds in trust for the United States that portion which is required to be deducted as a transfer tax, the question has been presented whether the executor will be required to pay income tax upon the interest earned by the amount so held, for the benefit of the Government.

Held, that the setting aside of a certain sum belonging to an estate for the liquidation of estate taxes does not establish a trust within the meaning of section 219 of the Revenue Act of 1918. Any amount received by the executor as interest upon the sum so held is income to the estate and is taxable in the same manner and to the same extent as other income accruing to the estate."

This ruling of the Treasury Department is obviously sound. Any other ruling would seem to be absurd on its face but, that being so, what becomes of the reasoning in the opinion of the Acting Attorney-General of April 10, 1920?

F. W. G.

THE IMMEDIATE PRACTICAL EFFECT OF THE SUFFRAGE AMENDMENT ON THE TOWN-MEETING QUESTION.

A discussion of the representative town-meeting plan as affected by the Massachusetts Constitution appeared in the February number of the *Massachusetts Law Quarterly* for 1919 (Volume IV, pages 49-93). The practical situation of the larger towns was discussed and the difficulties of holding town-meetings on important matters when there was no town building large enough, or likely to be large enough, to hold them, were pointed out. This discussion attracted so much interest in various parts of the state that it was reprinted in pamphlet form.

Those towns which have already found difficulty in providing a proper place for a town meeting when any considerable portion of townspeople showed enough public interest to attend, will suddenly find their problem doubly difficult now that the electorate is increased to include all the women entitled to vote in every town.

The question may well be considered whether under the circumstances it is advisable to amend the second amendment of the constitution by eliminating the requirement of "twelve thousand inhabitants" so that the legislature could in its discretion establish "municipal" governments of such a "representative" character as was desired, with the consent, and on the application, of the inhabitants, without any arbitrary constitutional requirement of population.

At all events, there appears to be a condition and not a theory facing a large number of towns and the question how it is to be dealt with may sooner or later effect very seriously the character and effectiveness of local government throughout the Commonwealth.

If town meetings are to be run on important questions by people who succeed in getting into the town hall first and filling it up so that other citizens have no real chance to take part in the town government, a serious situation is not only invited, but encouraged, to avoid which some form of representative system seems necessary. Open air meetings are not likely to be very successful as deliberative assemblies in New England.

A constitutional amendment if proposed to, and approved by, the incoming legislature could not be submitted to the people until November, 1923 (see IV. Mass. Law Quart. 142-3).

F. W. G.